Petition

81-700

Office - Supreme Court, U.S.
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OCT 9 1981
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

October 1981 Term

EARL LOESCH AND HENRIELLA BYNON

GEORGE R. WAGNER, et al.

NICHOLAS AND MARGARET PURCELL

JOHN H. McGEHEE, et al.

JAMES CHOUINARD, et al.

LETHA M. TOLLIVER, Administratrix of
Estate of Alfred Tolliver, deceased, et al.

Petitioners.

vs.

THE UNITED STATES

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES

COURT OF CLAIMS

Charles S. Gleason, Attorney of
Record for Petitioners,
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(a) QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Claims ever conduct a "De Novo Determination Hearing" in this case wherein a taping was made only for the convenience of the Article III Judges, was never available to Counsel for Petitioners, but erased immediately upon rendition of the Court's decision?

2. Does the Court of Claims ever conduct any "De Novo Determination Hearings" on any Fifth Amendment taking cases when, as a matter of practice, those hearings are taped only for the convenience of the Judges and never available to Counsel for Petitioners but tapes are erased immediately upon rendition of the Court's decision?

3. Did the Court of Claims under Rule 31 (b) delegate, as a matter of course, authority to an Article I Commissioner to Find only Selected Facts supportive of his Recommended Opinion in derogation of 28 U.S.C. 2503(b)?

4. Did the Court of Claims' routine adherence to the Appellate Procedure [Rule 13(d)] and of presumption that the trial (Judge) Commissioner's Recommended Findings are correct [Rule 147(b)] deny Petitioners the Due Process right to <u>full</u> consideration of all the evidence by Article III Judges, all in derogation of 28 U.S.C. § 2503(b)?

5. Did the filing of the exceptions to the Commissioner's report of

certain facts and the filing of the exceptions to the Commissioner's recommendations for conclusions of law, mandate "a hearing thereon before the Court within a reasonable time", and mandate a specific de novo determination of each such exception for the record?

6. Have the private interests implicated been accorded due process in the absence of the procedural safeguard that "the one who hears" must report "all that he hears" "on material issues" from those witnesses he deems most creditable, so that the reviewing Court can make a de novo determination of the credibility as it appears in the full record?

7. Could the reviewing Article III Panel have made true de novo determinations of contested

credibility assessments as to selected findings by reviewing as to each witness only his testimony of record as to a single material issue when the Article I Magistrate (Judge) or Commissioner failed to make any credibility assessment as to many material facts upon which the same witness testified at length?

8. Did the U. S. Court of Claims render a decision herein in conflict with another recent decision of the same Court and of the Supreme Court?

9. Did the U. S. Court of Claims so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power

of supervision?

(b) ADDITIONAL PETITIONERS

BILLY C. GLENN, CLYDE BENNER, MARY BENNER, FRANCES EVELYN McGEHEE, E. DAVIS McGEHEE, E. MARIE McGEHEE, CHERYL CHOUINARD, RALPH COX, BEUFORD CUNNINGHAM, CHESTER EATON, BERNARD GRIFFITH, DOUGLAS LEATHERBURY, DONALD R. McNELLY, MARY McNELLY, EUGENE POSTON, ELIZABETH POSTON, CHARLES L. RICE, JEAN RICE, ETHEL RICE, JACOB SCHWAB, JOSEPHINE SCHWAB, GERALD WILLIAMS, NORMAN L. WOOD, ANNA B. WOOD, JOHNNIE L. SHELTON

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(d) REFERENCE TO OPINION

The U.S. Court of Claims decision is reported as *Loesch v. United States*, 645 F.2d 905 (19[illegible]), Nos. 240-75, 430-75, 435-75, 1-76, 111-76 and 307-77, United States Court of Claims, March 11, 1981.

(e) JURISDICTION OF THE COURT

This Court has jurisdiction to review the judgment in these cases under 28 U.S.C. 1255 (1), by Petition for Writ of Certiorari from the United States Court of Claims. Petitioners allege that the U. S. Court of Claims by interpretation of 28 U.S.C. § 2503(b) by its Rules 13(b), 13(d) and 147(b) so conformed its practice to deny Petitioners the safeguards of procedural Due Process, violated Petitioner's

Constitutionally Guaranteed Rights of Just Compensation for a Fifth Amendment taking of their real property interests.

(f) THE CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, AND REGULATIONS

Court of Claims Rule 13(b), 13(d)

Court of Claims Rule 147(b)

House Doc. 306, 1st Sess., 74th Congress 1935

28 U.S.C. § 636(b)(1)(c)

28 U.S.C. § 1651(a)

28 U.S.C. § 2503(b)

United States Constitution Article I

United States Consitution Article III

1911-14 Survey of the Ohio River

(g) STATEMENT OF THE CASE

On or about *October 31, 1979* these cases were consolidated and assigned to

Statutory Commissioner Thomas J. Lydon who was delegated and exercised full authority and recommended selected Findings of Fact, ignored multiple material facts requested and objections filed, ignored empirical evidence, ignored physical laws of nature, ignored the well-established line of Supreme Court cases and ignored recent decisions of the United States Court of Claims.

The bulk of the *Loesch* record is filed with this Court. Petitioners complain of conduct which appears routinely established by unconstitutional Rules of the United States Court of Claims.

(h) THIS IS NOT A STATE COURT ACTION

(i) JURISDICTIONAL AUTHORITY of the United States Court of Claims in

the first instance is the Tucker Act, 28 U.S.C. § 1491 and 28 U.S.C. § 1845 et seq.

(j) ARGUMENT

1. On *July 16, 1975* a Complaint entitled *Earl Loesch and Henriella Bynon v. The United States* was filed in the United States Court of Claims, Cause No. 240-75, alleging, under the Tucker Act, an uncompensated Fifth Amendment taking by raising the waters of the Ohio River increasing the Cubic Feet Per Second Flow, involving construction of a series of dams including flood control reservoirs on tributaries in fourteen (14) states.

2. On *December 11, 1975* a Complaint entitled *George R. Wagner, Billy C. Glenn and Clyde and Mary Benner v.*

The United States, was filed in the United States Court of Claims, Cause No. 430-75, alleging the same. The claims of Clyde and Mary Benner were withdrawn at trial and the petition as to these plaintiffs dismissed.

3. On *December 16, 1975* a Complaint entitled *Margaret Purcell and Nicholas Purcell v. The United States* was filed in the United States Court of Claims, Cause No. 435-75, alleging the same.

4. On *January 5, 1976* a Complaint entitled *John H. McGehee, Frances Evelyn McGehee, E. Davis McGehee and E. Marie McGehee v. The United States* was filed in the United States Court of Claims, Cause No. 1-76, alleging the same.

5. On *March 10, 1976* a Complaint entitled *James Chouinard, Cheryl*

Chouinard, Ralph Cox, Beuford Cunningham, Chester Eaton, Bernard Griffith, Douglas Leatherbury, Donald R. McNelly, Mary McNelly, Eugene Poston, Elizabeth Poston, Charles L. Rice, Jean Rice, Ethel Rice, Jacob Schwab, Josephine Schwab, Gerald Williams, Norman L. Wood, Anna B. Wood and John Dickensen v. The United States, was filed in the United States Court of Claims, Cause No. 111-76, alleging the same.

6. On *June 2, 1977* a Complaint entitled *Alfred M. Tolliver and Johnnie L. Shelton v. The United States* was filed in the United States Court of Claims, Cause No. 307-77 alleging the same.

7. All cases were consolidated for bifurcated trial of liability. The Pre-Trial Entry defining the

ISSUES for trial recognized the true nature of the Petitioners' Complaints, i.e. the taking by the construction and operation of a series of dams, together with increased CFS causing uncontrolled and uncompensated erosion. See Court Exhibit (h) of the record filed herein. The full scale of the deliberate take was outlined in House Document 306, 74th Congress, 1st Session 1935. Excerpts filed herein as APPENDIX A of Plaintiffs'Brief In Opposition to Opinion Filed October 31, 1979. The Article I Judge, for reasons known only to himself, ignored the major issues and made Findings of Fact limited only to minor issues.

8. On *January 13, 1981* an Argument and Submission on the Merits was conducted before a Panel of three Article III Judges. Counsel were

permitted twenty (20) minutes per side.

9. On *March 11, 1981* the Article III panel as an Appellate tribunal decided only that the Facts found supported the Decision. Thus they were never given an opportunity nor, according to their Rules, would they take the opportunity to compare the evidentiary facts to the issues delineated in the Pre-Trial Entry.

10. The trial took four (4) weeks in blizzard conditions, produced a six thousand (6,000) page transcript plus 6500 exhibits. The transcript is on file but does not include any record of the "De Novo Determination Hearing" which was limited to twenty (20) minutes per side.

11. As a matter of routine practice, the Court of Claims, "Article III De Novo Determination Hearings" are

recorded, but only for the convenience of the Judges, are erased immediately upon rendition of their decision and are never available to Counsel.

12. On August 6, 1981 Chief Justice Warren E. Burger, upon Petitioners' Application, timely filed, granted an ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI to and including October 12, 1981.

13. There can never be a review of a full record by the Supreme Court upon grant of Certiorari because the record cannot be complete as there is no procedural safeguard by Court of Claims Rule or Supreme Court Rule to guarantee full compliance with Constitutional Due Process intended by Congress in the delegation under 28 U.S.C. § 2503(b).

14. Petitioners are prejudiced by

the practice and procedure of The United States Court of Claims by which they are prevented from demonstrating either to the Article III panel, or to The Supreme Court that the record, in its entirety, fully supports a decision in favor of Petitioners.

15. At the alleged "De Novo Determination Hearing", Chief Judge Cowen, in language indicating pre-judgment, addressed Petitioners' Counsel:

> "We have very little time here. We have a decision by a very competent Judge and you must, if you can, tell us why we should not adopt his decision."

16. Justice Cowen agreed, in argument, to take judicial notice of House Document 306, First Session, 74th Congress 1935, but the record sent up to this Court contains

no transcript of that hearing and no order indicating said notice was, in fact, taken of the 198-page technical volume.

17. Petitioners also requested the Panel to reopen evidence (ordered closed by the Magistrate on May 5, 1978) to include a pertinent Environmental Impact Statement. Both documents had been obtained following "close of proof", one by search of the Congressional Record and the other by "Freedom of Information Request". The existence of any such studies had been denied under oath in response to written Interrogatories and Requests For Production which Pleadings are a matter of record.

18. On March 11, 1980 concurrent with the Dismissal Order, Opinion Per Curiam, Judge Kunzig issued an order denying Petitioners'

motion to reopen proof and to remand the case to the Trial Judge for additional Findings.

19. The lack of Procedural Due Process flies in the face of *United States v. Raddatz*, _____ U.S. _____, 65 L. Ed 2d 424, 100 S Ct. _____, Argued February 25, 1980. Decided June 23, 1980, wherein Chief Justice Burger cited with approval *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950) that:

> "The guarantees of due process call for a 'hearing appropriate to the nature of the case.'
>
> xxx
>
> "To be sure, courts must always be sensitive to the problems of making credibility determinations on the cold record. More than one hundred years ago, Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading the notes of the witnesses' prior testimony:
>
> 'The most careful note must

> often fail to convey the evidence fully in some of its most important elements xxx. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; xxx the dead body of the evidence, without its spirit, which is supplied, when given openly and orally, by the ear and eye of those who receive it.'
>
> *Regina v. Bertrand*, 4 Moo PC (NS) 460, 481 (1867)."

Chief Justice Burger in *U.S. v. Raddatz* supra also observed in foot note 7."

> "7. Neither the statute nor its legislative history reveals any specific consideration of the situation where a district judge after reviewing the record in the process of making a de novo 'determination' has doubts concerning the credibility findings of the magistrate. The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing

> the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach."

20. Petitioners allege that in argument and submission on the merits, on March 11, 1981 of which no record exists it was pointed out by Petitioners' Counsel that existence of House Document 306 and the Environmental Impact Statement on the Construction of the Cannelton, Newburgh and Uniontown Dams was hidden by Respondent's false Answers to Interrogatories and Motions to Produce and that these are Official Record admissions against interest totally destroying the credibility of the Respondent's key witnesses. The Article III Judges must take judicial notice of the Congressional Record and Official Records of the Respondent Agency. Therefore as a matter of law they raised the spectra of credibility of all of Respondent's Experts.

The decision against reopening the evidence thereafter was precisely the conduct which Chief Justice Burger recognized could well give rise to serious questions not reached by this Supreme Court in *Raddatz* supra.

21. The material issues actually presented by the record to which the Statutory Commissioner made no findings of fact, conclusions of law or decision are:

[1) Whether the Corps of Engineers may deprive the Petitioners of their Fifth Amendment Just Compensation by:

(a) Issuing Regulations in derogation of Congressional Mandate;

(b) Promulgating a line for lower taking which sounds like the legal terminology

for the historical Ordinary High Water Mark but does not denote the true navigable servitude;

(c) Inaccurate and incomplete verbal descriptions of the alleged take in Offers to Sell, Warranty Deeds of Flowage Easement and Declarations of Take designed to misrepresent the size of the take and its location;

(d) Omitting on-the-ground surveys which are required by statute;

(e) Preparing inaccurate maps from compilations to display to the landowners and the Court;

(f) Concealing or attempting to conceal the 1911-14 Survey Maps of the Ohio River which are the final recorded on-the-ground survey of the Ordinary High

Water Marks (both banks) of the Ohio River before cannelization;

(g) Hiring experts to refute their numerous "prior inconsistent" Reports to Congress as contained in the Congressional Record, the Federal Register and Documents Published and distributed by the Government Printing Office;

(h) Conducting a month-long trial presenting testimony of deliberately uninformed employees.

[2] Commissioner Lydon failed to address the substantial issues whether or not:

(a) The Respondent has the burden of proving compliance with its Trust to establish

a definite legal description of its alleged servitude; to locate by legal on-ground survey and to disclose factors comprising its alleged appraisal of damages caused by the attempted take;

(b) Material misrepresentations were made by the Corps as to the extent of its Trust Corpus (the Navigable Servitude) in its dealings with the landowners;

(c) The Corps has authority to issue Unconstitutional Regulations through which Petitioners-Landowners were misled as to their legal rights to compensation.

(d) The Corps regulations, as notice to the whole world, were unconstitutionally restrictive and contrary to Supreme Court decisions binding on the Court of Claims;

(e) The OHWM is the recorded-by-survey Ordinary High Water Mark of the river in its natural state;

(f) The Navigable Servitude is below the historically surveyed Ordinary High Water Mark;

(g) The Corps is the delegated trustee of the record of the Ordinary High Water Mark as it existed on the Ohio River in its natural state;

(h) The Corps had a duty to resurvey, on the land of the Petitioners, according to the Recorded Plat by which they took title, the Recorded OHWM of 1911-14 being the last recorded survey of the Ohio River in its natural state;

(i) The Corps had an affirmative duty by Congressional Mandate to disclose to the

landowners the factors used in arriving at the appraisal of damages for the alleged take;

(j) The Petitioners were damaged by the Unconstitutional and unlawful conduct of the Corps and continue to be so damaged;

(k) The conduct of the Corps having been designed to misleád the landowners estoppes the Corps from pleading *laches*, or statute of limitations, and that the Petitioners claims are timely;

(l) The damages are continuing and that there is a duty of the Corps to take measures to stop or to mitigate future damages to these Petitioners;

(m) By Regulation the Corps discriminately excluded appropriated authority and relief for damages to private property along the Ohio River;

(n) Money damages alone are inadequate and not a viable remedy to Petitioners;

(o) Riprap or similar physical protection of the Petitioners land is the only viable remedy;

(p) Petitioners have been irreparably damaged and have not received Just Compensation;

(q) Petitioners proposed Findings of Fact unopposed by Respondent and supported by the evidence in the transcript should be adopted by the Court;

(r) Based upon the Record the facts clearly establish as a matter of law that the Petitioners are entitled to the relief sought; including "Class Action" status;

(s) Only the issue of damages

shall remain to be tried.

[3] Petitioners contend herein more than dissatisfaction. It is UNCONSTITUTIONAL application of Rules.

(a) Petitioners filed 1,313 Proposed Findings. Respondent filed NO OBJECTION to 1,050 (or 80%). Of Respondent's 265 "Objections" only 57 referenced the Court to the transcript for a contrary view. Of Respondent's 57 references to the transcript only 16 cited a total of 11 of Respondent's Exhibits.

(b) Respondent filed 171 Proposed Findings. Petitioners filed NO OBJECTION TO 52; and referenced the record on the others.

(c) The "Trial Judge" as Statutory Commissioner

recommended "Findings of Fact" totalling 106, which so closely follow those of the Respondent as to appear that they and the recommended OPINION were, in fact, the work product of the Respondent United States, Department of Justice, Trial Counsel;

(d) The "Panel" though alerted to credibility issues blindly, adopted without a single modification the *verbatim* package, which is contrary to physical laws of nature and contrary to law, including decisions of the United States Supreme Court and of the very same United States Court of Claims of recent months. The only distinction between *Simon*

Zunamon and Chicago Mill and Lumber Company v. The United States Ct. Cl. No. 80-78 (July 27, 1979) (Appendix D), a recent decision in which the same Judge Smith concurred, is the magnitude of the damages, which would be proven as to the Ohio River after the issue of liability in the bifurcated trial has been ultimately resolved.

22. The Court of Claims Rules are being stretched beyond Constitutional Bounds to an abuse of discretion and to an effective denial of justice.

23. The limitations on delegation of authority are elsewhere defined.

28 U.S.C. 2503 provides only for a report of findings of fact and recommendations for conclusions of law, and for opportunity for the parties

to file exceptions thereto, and a hearing thereon before the Court.

28 U.S.C. § 636(1) (C) provides, in part:

> "A judge of the Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

24. To conclude therefrom that the "Trial Judge" (or Statutory Commissioner, or whatever Article I Judge be called), need only make a Report of those Findings which are in dispute and to frame a recommended OPINION based on only those Findings alone is to deny due process. Neither he nor the Court of Claims has any right to bury undisputed facts.

25. If that practice has been tolerated since the Supreme Court Rule of review from the Court of Claims shall be by Petition for Writ of Certiorari adopted in 1948 then Justice Burger is wholly justified in his evaluation of the competency or lack thereof of the Members of the Bar. This Counsel cannot accept this limited edition of justice as that contemplated by the Constitution or *U. S. v. Raddatz* ___ U.S. ___ 65 L.Ed.2d 424,100 S.Ct.___.

SUMMARY

An Article III Panel without examination of the record cannot, upon a simple review of an Article I Commissioner's Opinion and Findings of Fact in support thereof, weigh the preponderance of all the evidence and render an impartial judgement after 40 minutes of argument.

These Fifth Amendment Taking cases

originated in the Court of Claims and must be treated with full Constitutional *de novo* trial rights by the Article III Judges.

Delegation to a Statutory Commissioner designated "Judge" must mandate that he "report" to the Panel "Findings of Facts" on all material issues raised by the evidence and limited by the "Pre-Trial Entry". Otherwise, there can be no weighing of the evidence by the Article III Judges as required by the Constitution.

Petitioners respectfully submit that the circumstances of the record, the deviation of the United States Court of Claims from the usual and customary practices and procedures of due process should excuse Petitioners' inability to duplicate herein at this time in the Appendix much more than the General Docket of Case No. 240-75 *Loesch* which with the record transmittal evidences the violation of the Fifth Amendment

Constitutional Rights of these Petitioners. Examination of the record is the only recourse available for any exercise of this Court's supervisory capacity of any Tucker Act decision of the Court of Claims.

ARGUMENT FOR ALLOWANCE OF WRIT

The Court of Claims, as a matter of practice and procedure, and Rules 13(b), 13(d) and 147(b) so departed from the accepted and usual course of judicial proceedings to render meaningless 28 U.S.C. § 636(1)(c), 28 U.S.C. § 1651(a) and 28 U.S.C. § 2503(b), *U.S. Constitution Article III; U.S. Constitution, Fifth Amendment and U.S. v. Raddatz* ___U.S. ___, 65 L.Ed. 2d 424, 100 S. Ct __; *Simon Zunamon and Chicago Mill and Lumber Company, v. The United States* Ct. Cl. No. 80-78 (July 27, 1979) all unavailing to Petitioners, so as to call for exercise of the U.S. Supreme Court's power of supervision under Title 28 U.S.C. 1651(a) and *S. Ct. Rule 17.*

Compare *Loesch* Appendix C pp 24-27 with

the *Zunamon* supra opinion holding:

> "Defendant's entire case, however, depends on the accuracy of its identification of the OHWM. We do not think that so vital a point can be treated as not a triable issue, where the conclusion rests on expert opinion testimony, even if the latter is not directly controverted. On trial, plaintiffs would not have to rebut this evidence with an expert of their own. They could cross examine the opposing expert and possibly show his opinion was not based on facts. Correspondingly, it does not appear a court can conclude, in such a case as this, that no triable fact issue exists, simply because no rebuttal opinion testimony is offered. Another difficulty is that the expert saw the property in 1978, six years after the lock and dam commenced to operate. It would seem, to the extent the line of plant demarcation establishes the OHWM, it would be that line that existed when the river was in its natural state, a condition that ended in 1972. That the line has moved upwards is strongly suggested by defendant's own concession that, before its expert's survey, it had determined that OHWM was at 41.5 feet above msl."

The final decision in *Zunamon* was an award of damages to Plaintiffs filed June 23, 1980 from which no Appeal was taken.

WHEREFORE, Petitioners pray for an examination of the Record;Order setting aside the dismissal mandating that the Court of Claims perform its statutory duty, that it be mandated to require a competent Statutory Commissioner to report all findings of fact pro and con to all material issues so they can be weighed by the Panel of three Article III Judges in arriving at their decision, or for an Order Finding for Petitioners on the issue of liability and all other relief deemed proper in the premises.

Respectfully submitted this 9th day of October, 1981.

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In the United States Court of Claims

EARL LOESCH AND HENRIELLA BYNON	No. 240-75
GEORGE R. WAGNER, ET AL.	No. 430-75
NICHOLAS AND MARGARET PURCELL	No. 435-75
JOHN H. MC GEHEE, ET AL.	No. 1-76
JAMES CHOUINARD, ET AL.	No. 111-76
LETHA M. TOLLIVER, ADMINISTRATRIX OF ESTATE OF ALFRED TOLLIVER, DECEASED, ET AL.	No. 307-77

v.

THE UNITED STATES

I, Frank T. Peartree, Clerk of the United States Court of Claims, certify that the accompanying eight (8) cartons constitute the complete records as filed in this court in these cases. These papers, for transmittal to the Supreme Court of the United States at plaintiffs' request, are the originals of all items as set forth in the certified copies of

the docket sheets attached hereto.

IN TESTIMONY WHEREOF I HAVE hereunto set my hand and affixed the seal of the Court of Claims at Washington City this twenty-seventh day of May, A. D., 1981.

Clerk, United States Court of Claims

GENERAL DOCKET

CASE NO. 240-75 LOESCH

Relevant Entries	
Jul 28 1975	Notice of reference to Trial Judge Thomas J. Lydon filed. Copy to parties.
Sep 23 1975	Re plaintiffs' motion, filed July 16, 1975, for order providing for giving of notice of this action: DENIED SEP 23 1975--No persuasive showing made that all elements justifying class action status present especially as to numerosity and commonality. See William Goldman Theatres, Inc. V. Paramount Film Distributing Corp., 49 F.R.D. 35, (E.D. Pa. 1969). Defendant's suggestion that the court does

not have class action jurisdiction is without merit. Quinault Allottee Assn., v. United States, 197 Ct. Cl. 134, 453 F. 2d 1272 (1972).

Oct 6 1975 Plaintiffs' request for review of trial judge's orders of September 23, 1975 filed. Copies (2) to deft.

Nov 7 1975 Court entered order denying, without prejudice, plaintiffs' request for review, filed October 6, 1975. Copy to parties.

Mar 24 1976 Plaintiffs' motion to compel answers to interrogatories filed. Copies (2) to deft. DENIED MAY 4 1976--principally for reasons set forth in defendant's response in opposition to said motion.

Mar 31 1976	Defendant's motion for extension of time (to April 19, 1976) to file opposition to motion to compel answers to interrogatories filed. Copies (2) to atty. ALLOWED APR 1 1976.
Apr 19 1976	Defendant's response in opposition to motion to compel answers to interrogatories filed. Copies (2) to atty.
Apr 28 1976	Plaintiffs' motion for an order directing defendant to respond to requests for admissions filed. Copies (2) to deft. DENIED JUN 14 1976 as moot, see complete endorsement on motion.
May 26 1976	Defendant's answers to requests for admissions and objections to motion

filed. Copies (2) to atty.

Dec 20 1977 Trial judge's memorandum of pretrial conference and trial judge's order re attorney of record filed (in this and related cases). Copy to parties and to Mr. Hay. [plaintiffs to file notarized statements with the Clerk on or before January 6, 1978 re attorney]

May 4 1978 In this, and related cases, transcript of testimony (twenty volumes) and a Master Index, taken at Louisville, Kentucky, on January 10-13, 16-19, 23-31, 1978 and February 1-3, 1978; together with.....

.....

...plaintiff's exhibits 1 thru 11, 12(a) thru 12(i), 13, 30(a) thru 30(d), 31(a) thru 31(d), 32(a-j), 33(a-l), 34 thru 40, 41-A thru 41-D, 43 thru 52, 53 A & B, 55, 56, 57 A-S, 58 thru 60, 61 A-E, 62 A-I, 63 thru 73, 84 thru 88, and 90 thru 111; defendant's exhibits 1, 2-1 thru 2-16, 3, 4-1 thru 4-10, 5-1 & 5-2, 6-1 thru 6-4, 7-1 thru 7-3, 8-1 thru 8-4, 9-1 thru 9-4, 10-1 thru 10-3, 11-1 thru 11-13, 12-1 thru 12-7, 13-1 & 13-2, 14-1 thru 14-5, 15-1 thru 15-4, 16-1 thru 16-4, 17-1 thru 17-8, 18-1 & 18-2, 19-1 & 19-2, 20-1 thru 20-8, 21-1 thru 21-5, 22-1 thru 22-8, 23-1 thru 23-7, 24-1 thru 24-6,

25-1 thru 25-7, 26-1 thru 26-4, 27-1 thru 27-6, 28-1 thru 28-6, 29-1 thru 29-6, 30-1 thru 30-8, 31-1 thru 31-8, 31 (a-c), 32-1 thru 32-8, 32 (a&b), 33A, 34A, 35-1A & 35-2A, 36A thru 43A, 44 thru 49, 50 (in 2 parts), 51 thru 289, 290 (in 21 parts), 291 (in 18 parts), 294 (in 10 parts), 295 (in 11 parts), 296, 297 (in 13 parts), 298 (in 3 parts), 299 (in 10 parts), 300 A&B, 301(a), 301(b), 302 thru 335, 336-1 thru 336-5, 337 thru 339, 340-1 & 340-2, 341 thru 351, 352 (1-5), 353 (1&2), 354 thru 366, 367 (one wooden box containing numerous photos), 368 (one wooden box containing numerous photos),

369 (one wooden box containing numerous photos), 370 (one wooden box containing numerous photos), 371, 372 (13 slides), 373 thru 376, 377 (13 slides), 378, 379, 380 (6 slides), 381 (5 slides), 382, 384 A&B, 385 thru 389, 390 (2 parts), 391 A-C, and 392; and court's exhibits A, B(1-3), C(1-3), D(1-3), E(1-3), F(1-3), G(1-3), H thru M, and N(1) thru N(5) filed. Notice to parties.

May 5 1978 Trial judge's order closing proof, etc., filed. Copy to parties. (July 5, 1978, 60 & 30). (in this and related cases).

Sep 5 1978 Plaintiffs' findings of fact and brief to the trial judge filed. Copies (2) each to deft.

Jan 11 1979	Plaintiff's renewed motion for class action filed. Copies (2) to deft. DENIED FEB 22 1979 SEE ENDORSEMENT ON MOTION.
Feb 9 1979	Defendant's requested findings of fact filed. Copies (2) to atty.
Feb 9 1979	Defendant's objections to plaintiffs' proposed findings of fact filed. Copies (2) to atty.
May 10 1979	Plaintiffs' objections to defendant's proposed findings of fact filed. Copies (2) to deft.
Oct 31 1979	Trial Judge's order consolidating cases [Nos. 430-75, 435-75, 1-76, 111-76 and 307-77] filed. Copy to parties.

Oct 31 1979	Trial Judge's opinion and findings of fact filed. Copies (5) to parties (in this, and related cases).
Nov 29 1979	Plaintiffs' motion for extension of time (to Feb. 6, 1980) to file notice of intention to except filed. Copies (2) to deft. (in this and related cases). ALLOWED DEC 14 1979, with no further extension to be granted except for extraordinary circumstances
Dec 3 1979	Plaintiffs' notice of intention to except filed. Copies (2) to deft. (in this, and related cases).
Dec 10 1979	Plaintiffs' motion for leave to exceed the page limitation filed. Copies (2) to deft.

(in this, and related cases). DENIED DEC 11 1979 with the notation that Rule 144(e)(1) provides for a printed brief of 70 pages, exclusive of other data and material as set forth in the Rule.

Mar 24 1980 Plaintiff's exceptions and brief filed. Copies (5) to deft. (in this, and related cases).

Jun 27 1980 Plaintiffs' motion to reopen proof and remand to the Trial Judge filed. Copies (2) to deft. (In this, and related cases). SEE ENTRY OF JULY 25, 1980.

Jul 2 1980 Defendant's response to plaintiffs' motion to reopen proof filed in this, and related cases. Copies (2) to atty.

Jul 17 1980 Plaintiffs' reply to defendant's response to plaintiffs' motion

to reopen proof filed in this, and related cases. Copies (2) to deft.

Jul 23 1980 Defendant's response to plaintiffs' exceptions filed. Copies (5) to atty.

Jul 23 1980 Defendant's memorandum in opposition to plaintiffs' exceptions in support of recommended opinion and findings filed. Copies (5) to atty.

Jul 25 1980 Re: plaintiffs' motion, filed June 27, 1980, to reopen proof and remand to Trial Judge - - July 25, 1980. This motion is referred for appropriate action to the panel of the court which is to a.... the case on exceptions to the Trial Judge's Report.

Oct 7 1980 Plaintiffs' reply brief (in two parts) filed in this and

	related cases. Copies (5) each to deft.
Jan 13 1981	Argued and submitted on the merits, (this and related cases.) [Before Kunzig, Cowen and Smith]
Mar 11 1981	Court filed order denying plaintiffs' motion to re-open proof and to ..... the case to the trial judge [in this, 430-75, 435-75, 1-76, 111-76.] Copy to parties.
Mar 11 1981	The petitions are dismissed [in this, 430-75, 435-75, 1-76, 111-76.] Opinion Per Curiam. Copies to parties.
Mar 30 1981	Plaintiffs' motion for re-hearing en banc filed. Copies (2) to deft.
Apr 14 1981	Additional authority submitted by the plaintiffs ALLOWED to be filed. Copies (2) to deft.

[in this and related cases.]

Apr 15 1981 Plaintiffs' additional authority in support of motion for rehearing en banc ALLOWED to be filed, provided that no further or additional authority in support of plaintiffs' motion for rehearing en banc shall be accepted for filing; provided also that defendant shall have ten (10) days from this date for filing its response to plaintiffs' motion for rehearing en banc [filed in this and related cases]. Copies (2) to deft.

Apr 27 1981 Defendant's response to plaintiffs' motion for rehearing en banc filed. [in this and related cases]. Copies (2) to atty.

Apr 28 1981 Plaintiffs' motion to take an

	impeachment deposition of government wit. Dr. Joseph Hagerty filed. Copies (2) to deft. [filed in this and related cases]
May 15 1981	Court entered order denying plaintiffs' motions for re-hearing and to the deposition [in this and related cases]. Copy to parties.
May 20 1981	Plaintiffs' application for certification of the record filed [in this and related cases]. Copies (2) to deft. Fee of $5 paid by plaintiff.

SUPREME COURT OF THE UNITED STATES

NO. A-105

EARL LOESCH, ET AL.,

V. Petitoners

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),
It Is Ordered that the time for filing a petition for Writ of certiotari in the above -entitled cause be, and the same is hereby, extended to and including October 12, 1981.

/s/ Warren E. Burger

Chief Justice of the United States

Dated this 6th day of August, 1981

APPENDIX B

In the United States Court of Claims

(Decided March 11, 1981)

No. 240–75	EARL LOESCH and HENRIELLA BYNON v. THE UNITED STATES
No. 430–75	GEORGE R. WAGNER, ET AL. v. THE UNITED STATES
No. 435–75	NICHOLAS and MARGARET PURCELL v. THE UNITED STATES
No. 1–76	JOHN H. McGEHEE, ET AL. v. THE UNITED STATES
No. 111–76	JAMES CHOUINARD, ET AL. v. THE UNITED STATES
No. 307–77	LETHA M. TOLLIVER, Administratrix of Estate of Alfred Tolliver, deceased, ET AL. v. THE UNITED STATES

Norman E. Hay, attorney of record, for plaintiff. *Charles S. Gleason*, *Gleason, Hay & Gleason*, of counsel.

Hubert M. Crean, with whom was *Assistant Attorney General James W. Moorman*, for defendant. *Dorothy R. Burakreis*, of counsel.

Before COWEN, *Senior Judge*, KUNZIG and SMITH, *Judges*.

APPENDIX C

OPINION

PER CURIAM: These consolidated cases come before the court on plaintiffs' exceptions to the recommended decision (including an opinion, findings of fact, and conclusions of law) filed by Trial Judge Thomas J. Lydon.

The court hereby adopts the trial judge's findings and opinion as the basis for its judgment in the case. The findings, however, are not printed herein since his opinion sets forth the facts necessary for an understanding of the decision.

Therefore, the court concludes as a matter of law that plaintiffs are not entitled to recover, and their petitions are hereby dismissed.

OPINION OF THE TRIAL JUDGE

LYDON, *Trial Judge:* In these six consolidated cases,[1] owners of land adjacent to and/or on tributaries of the Ohio River,[2] seek to recover just compensation under the fifth amendment, on the theory of inverse condemnations, for damages to their lands resulting, they claim, from governmental actions emanating from the construction and operation of certain high-lift navigation locks and dams on the Ohio River. In substance, plaintiffs' claims are twofold. First, plaintiffs maintain that the construction and operation of the dams in question were such as to cause erosion on their lands thereby, in effect, taking their lands and entitling them to just compensation. Second, plaintiffs contend that defendant, acting through the United States Army, Corps of Engineers (the Corps), in obtaining flowage easements from them in

[1] These six cases were tried at a single trial session and, although some of the cases present minor differentiating factors, it is believed that consolidation, at this stage, and disposition of these cases by a single opinion is appropriate under the circumstances. Only the issue of liability is before the court, quantum having been reserved for further proceedings, if necessary.

[2] Claims are presented by 23 plaintiffs, husband and wife are treated as one plaintiff, involving 34 separate tracts of land. The claims of one plaintiff (Benner in No. 430-75) were withdrawn at trial and the petition as to these claims dismissed. While all plaintiffs owned the tracts in issue at time of trial, some plaintiffs were not the owners of said tracts at the time some of the operating events in issue took place. The significance of this observation will become apparent later in this opinion. It should be noted that similar claims by 88 additional Ohio River riparian landowners were filed after the trial of these cases (Ct. Cl. No. 161-78; Ct. Cl. No. 340-78; and Ct. Cl. No. 317-79).

connection with the dam projects in question was guilty of fraud and misrepresentation, particularly in the determination of the ordinary high water mark (OHWM), such that the compensation plaintiffs received for said easements was less than they were entitled to receive for what was actually taken from them.[3] For reasons to be discussed hereinafter, it is my opinion that plaintiffs are not entitled to recover and that their petitions should be dismissed.

I.

The Ohio River is formed by the junction of the Allegheny and Monongahela Rivers at Pittsburgh, Pennsylvania, and then flows for 981 miles to Cairo, Illinois, where it joins the Mississippi River. It is a navigable river for its entire length, falling 429 feet in its 981-mile course from Pittsburgh to Cairo.

The Ohio River is considered to be a "pleistocene river," *i.e.*, it was formed at or before the glacial period. This period is believed to have begun about a million years ago. While the Ohio River is considered to be basically an alluvial river, *i.e.*, one which erodes, transports and deposits sedimentary materials, its riverbanks at many locations are composed of bedrock, which serves to control not only the position of the channel at those locations but also to control the river's ability to erode at those points. These bedrock sites can contribute to erosion at other riverbank sites by diverting river currents toward such sites. Similarly, river current action serves to explain why riverbank erosion generally occurs on the outside of bends in the river.

The Ohio River, like other rivers, is dynamic. The highly variable flow of an unregulated river exerts considerable erosional forces on a river's bed and banks. In the general dynamics of a shifting and meandering alluvial river, materi-

[3] The ordinary high water mark (OHWM) formed the lower limit of the flowage easements acquired by defendant. The navigational servitude of the government extends to the OHWM. *United States* v. *Willow River Co.*, 324 U.S. 499, 509 (1945). The government must only pay for lands taken above the OHWM. *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 627-28 (1961); *Barnes* v. *United States*, 210 Ct. Cl. 467, 475, 538 F.2d 865, 870 (1976). The lower the OHWM, the greater the amount of land deemed taken and the greater the compensation due therefor. Absent other considerations, to the extent that plaintiffs can establish that the OHWM determinations as to each tract in issue are erroneously high, they would be entitled to additional compensation. *See Vanada* v. *United States*, 202 Ct. Cl. 1121, 1122-23 (1973).

als will shift position by erosion at one riverbank point and material deposition at another point. Accordingly, at any given time on most natural rivers, including the Ohio River, riverbanks can be found to be eroding, other riverbanks in the process of healing, and still other riverbanks in stable condition. Erosion of riverbanks on the Ohio River, as a natural phenomenon, has been taking place for hundreds of years.

Climatic conditions greatly affect river dynamics. It is well established that during flood periods, when river flow velocities are high, riverbank erosion generally can be expected to occur in varying degrees depending on circumstances. Velocity of the flow of a river, it is conceded, plays a most important role in riverbank erosion. It is also clear that precipitation affects riverbank conditions and contributes to erosion thereof. Further, uses, urban and/or agricultural, to which riparian lands are put can also cause and/or contribute to erosion of riverbanks. Finally, the construction and operation of artificial structures on rivers can, under some circumstances, alter the hydrology of river flow characteristics, sediment propensities, etc., such as to affect the natural inclinations of river action and thereby induce riverbank erosion at points where it may not have occurred absent the artificial structures. In any discussion of erosion, factors of topography, soil composition and characteristics, and river site location play important roles in causative determinations.

Improvement of the Ohio River for navigation purposes began in 1824. In 1878, a 6-foot canalization of the upper Ohio River began by construction of a system of locks and movable dams. Later a 9-foot canalization program throughout the entire length of the river was completed in 1929 with the construction of a system of 49 low-lift locks and dams. These low-lift dams had an estimated life of between 50–75 years. After the Second World War, there was a tremendous increase in river tonnage on the Ohio River. This, in turn, resulted in increases in the size of tows and barges on the river. This increased traffic and larger river vessels created delays at the low-lift dams and presented a serious obstacle to navigation on the Ohio River.[4]

[4] There is no reliable evidence in the record which supports plaintiffs' allegations that the low-lift dams were filling with sediment, were otherwise deficient or failed to perform as intended, and thus had to be replaced. It seems to be conceded that these

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In 1954, a modernization program to aid navigation on the Ohio River was undertaken. This program called for the construction of 19 high-lift locks and dams to replace the existing low-lift dams on the Ohio River. The high-lift dams on the Ohio River were constructed under the authority of the River and Harbor Act of March 3, 1909, 35 Stat. 817.[5] As of the date of trial, 17 of the high-lift dams had been constructed and were operational. One high-lift dam was under construction as of the date of trial, and construction of the last high-lift dam had been authorized. As a result of this modernization program, a smaller number of high-lift dams with larger locks eliminated the time-consuming and costly multiple lockages required by a greater number of low-lift dams and thereby improved navigation on the Ohio River. Three of these high-lift dams are involved in this litigation, *i.e.*, the Meldahl Locks and Dam, the Cannelton Locks and Dam, and the Newburgh Locks and Dam.

Meldahl Dam is located some 436 river miles below Pittsburgh, Pennsylvania. Construction on this project began in 1959 and was completed in 1964. The normal pool elevation of 485 feet mean sea level (m.s.l.) was reached on March 28, 1965. Meldahl Dam replaced four low-lift dams (Nos. 31, 32, 33 and 34). The pool created by this dam covered some 96 river miles and terminated below the Greenup Locks and Dam. Eleven plaintiffs own land adjacent to the Ohio River within the Meldahl pool. In general, construction of the Meldahl Dam, and attendant impoundment of river water,

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low-lift dams did not materially interfere with the downward course of the river and that they did not in many places materially raise the level of the water. While plaintiffs argue to the contrary, and the record is not crystal clear on the matter, the totality of the record supports the view that construction and operation of the low-lift dams did not abrogate the natural ordinary high-water mark which existed along the Ohio River prior to the construction of said dams. *See United States* v. *Cress*, 243 U.S. 316, 321 (1917). It is conceded that during high water, *i.e.*, flood periods, the low-lift dams exercised no control over the river and the river, during those periods, flowed in a natural, unobstructed manner.

[5] Plaintiffs argue in their proposed findings of fact that the Corps was without authority from Congress to engage in this modernization program, relying on language in *Atchison, Topeka and Santa Fe Ry. Co.* v. *Callaway*, 382 F. Supp. 610, 617 n. 15 (D.C. Cir. 1974), that, at best, can be considered dicta or an aside. As such, it is entitled to very little weight. *See Ingo* v. *Koch*, 127 F.2d 667, 677 (2d Cir. 1942). For subsequent history of the *Callaway* case see 431 F. Supp. 722 (1977) and 459 F. Supp. 188 (1978). There is absolutely no reliable evidence in this record which would support a finding that the high-lift dams in issue were constructed without congressional authority. Moreover, plaintiffs do not mention this argument in their briefs. Accordingly, as the matter is presented for consideration at this time, neither fact nor law have been advanced by plaintiffs which would justify a conclusion here that this modernization program was undertaken and completed, for the most part, without congressional authorization.

raised the level of the Ohio River in the vicinity of the riparian lands of plaintiffs Chouinard, Griffith, McNelly, Poston, C. Rice, E. Rice, Schwab, Wood and Skelton by 24 feet, and in the vicinity of the riparian lands of plaintiffs Cunningham and Tolliver by 17 feet. It should be noted that there was only a 2-foot increase in the water level of the Ohio River in the upper reaches of the Meldahl pool as a result of the construction of the dam. There is no reliable evidence in the record as to whether or not the Meldahl Dam was constructed with a 12-foot channel capability. The dam was operated, as far as can be determined on this record, to provide a 9-foot channel. Flowage easements attendant to this project were obtained by the Corps by purchase or condemnation from riparian landowners during the period 1961–1963.[6]

Cannelton Dam is located approximately 3 river miles upstream from Cannelton, Indiana, and some 114 river miles downstream from Louisville, Kentucky. Construction on this project began in 1962, and the project was completed and dedicated in 1974. The normal pool elevation of 383 feet m.s.l. was permanently reached on August 17, 1972. Cannelton Dam replaced three low-lift dams (Nos. 43, 44 and 45). The pool created by this dam covered some 114 miles and terminated below the McAlpine Locks and Dam at Louisville, Kentucky. Eleven plaintiffs own land adjacent to the Ohio River within the Cannelton pool. In general, construction of the Cannelton Dam, and attendant impoundment of river water, raised the level of the Ohio River in the vicinity of the riparian lands of plaintiffs Loesch, Bynon, Wagner and Leatherbury by 25 feet, in the vicinity of the riparian lands of plaintiffs Glenn, Purcell, J. McGehee (Tract 3828 E), Cox, Eaton and Williams by 16 feet, and in the vicinity of the riparian lands of plaintiffs E. McGehee and J. McGehee (Tracts 5101 E and 5112 E) by 9 feet. It should be noted that there was no increase in the water level of the Ohio River in the upper reaches, comprising about 20 percent of the total pool area, of

[6] These flowage easements, in general, gave the United States Army, Corps of Engineers (the Corps) the perpetual right to permanently and/or occasionally overflow, flood and submerge riparian fast lands, *i.e.*, lands above the ordinary high water mark (OHWM), above-stated elevations. These flowage easements also gave the Corps the continuing right to clear and remove, below stated elevations, timber, brush, debris and natural obstructions which in the opinion of the Corps may be detrimental to the dam projects.

the Cannelton pool as a result of the construction of the dam. The Cannelton Dam was constructed so as to provide for a 12-foot channel capability. However, at all times material herein, the dam has been operated to provide for a 9-foot channel and a normal pool elevation of 383 feet m.s.l. Flowage easements attendant to this project were obtained by the Corps by purchase or condemnation from riparian landowners during the period 1964–1967.

Newburgh Dam is located less than 2 river miles upstream from Newburgh, Indiana. Construction on this project began in 1965, and the project was completed and dedicated in 1975. The normal pool elevation of 358 feet m.s.l. was reached in January 1975. Newburgh Dam replaced two low-lift dams (Nos. 46 and 47). The pool created by this dam covered some 55 miles and terminated below the Cannelton Dam. One plaintiff, Dickenson, owned land adjacent to the Ohio River within the Newburgh pool. However, construction of the Newburgh Dam, and subsequent impoundment of river water, did not raise the level of the Ohio River in the vicinity of the riparian land of plaintiff Dickenson. Accordingly, it was not necessary for the Corps to acquire a flowage easement from plaintiff Dickenson. There is no reliable evidence in the record as to whether or not the Newburgh Dam was constructed with a 12-foot channel capability. The dam was operated, as far as can be determined on this record, to provide a 9-foot channel.

The high-lift dams were navigation dams. Their purpose was to maintain the river at a certain level during periods of low flow in order to float vessels. These dams were not designed to control floods by providing for reservoir-type storage of water. There were no flood control dams or reservoirs on the Ohio River. There were, however, flood control dams or reservoirs on tributaries of the Ohio River. The high-lift dams maintained the river at its appropriate depth by increasing or decreasing dam gate openings as required in order to hold the water level at normal pool stage. However, during periods of high flow, *i.e.*, flood conditions, the gates of these dams are fully opened and these dams exercise no control over the river or its flow. As a result, during periods of high flow, the Ohio River is essentially flowing and acting in its natural state. In terms of flow, it was determined that when the river flow reached 325,000

cubic feet per second (cfs), the gates of these dams were fully opened, and an open, natural, and unrestricted river existed. Hydrographic data germane to the pool areas in issue showed that in 1966 river flow exceeded 325,000 cfs three times; in 1967 twice; in 1968 once; in 1969 none—a dry year; in 1970 no evidence; in 1971 four times; in 1972 four times; in 1973 four times; in 1974 four times; in 1975 four times; in 1976 two times; and 1977 none—a dry year. After recession of high river flow to the point where the gates can again control, the high-lift dams commence operation to maintain a normal pool level, *i.e.*, 485 feet m.s.l. in the case of the Meldahl Dam, 383 feet m.s.l. in the case of the Cannelton Dam, and 358 feet m.s.l. in the case of the Newburgh Dam. It is to be noted that as a result of the rise in water level by high-lift dam impoundment, there was a smaller range of fluctuation from normal pool to flood stage and back down to normal pool than was the case before impoundment. It is also to be noted that during periods of low or normal flow, the high-lift dams do serve to reduce the velocity of flow through their pools. As indicated earlier, velocity of river flow is a vital factor in riverbank erosion.

The record in this case clearly establishes that the construction and operation of these high-lift dams do not cause floods, or increase the number of floods, or affect flood peaks and time intervals, or increase the effect of flood events. These facts were confirmed by a study conducted by the University of Cincinnati, which study was prompted by charges that the high-lift dams had increased the number and frequency of floods on the Ohio River.

II.

It is well established that the Federal Government under the commerce clause of the Constitution, has the power to improve navigable waters in the interest of navigation. *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 70 (1913). It is likewise established, however, that if any such improvement on a navigable stream raises the water level in the river and thereby directly damages privately-owned property situated above the OHWM, the government is liable, on the theory of a fifth amendment taking, for the ensuing damages. *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799,

806-08 (1950); *United States* v. *Cress*, 243 U.S. 316, 320–21, 326–29 (1917); *Goose Creek Hunting Club, Inc.* v. *United States*, 207 Ct. Cl. 323, 331, 518 F.2d 579, 583 (1975); *see Barnes* v. *United States*, 210 Ct. Cl. 467, 474–76, 538 F.2d 865, 870–71 (1976) and cases cited therein. In situations where governmental action in raising the level of navigable waters is the direct and proximate cause of resulting erosion on privately-owned property above the OHWM, the government has been held liable for such damages. *See United States* v. *Dickinson*, 331 U.S. 745, 750 (1947); *Stockton* v. *United States*, 214 Ct. Cl. 506, 513–15 (1977). On the other hand, if there is no proper showing that governmental action was the proximate and direct cause of the erosion damage, there can be no liability on the part of the United States for a fifth amendment taking. *Yazel* v. *United States*, 118 Ct. Cl. 59, 70–73 (1950); *Coates* v. *United States*, 124 Ct. Cl. 806, 811–13 (1953). *See Sanguinetti* v. *United States*, 264 U.S. 146, 149–50 (1924); *Matthews, Trustee* v. *United States*, 87 Ct. Cl. 662, 719–20 (1938).

The erosion issue in these cases is not legal, it is factual. The question to be resolved is whether the construction and/or operation of the involved structures was the direct and proximate cause of the erosion which has taken place, and is taking place, on plaintiffs' riparian lands. Plaintiffs maintain that the impoundment of water by the construction of the Meldahl and Cannelton Dams raised the level of the Ohio River in the vicinity of their riverbank properties thereby permitting wind and vessel waves to erode their riverbanks at higher levels than was the case before impoundment.[7] As noted earlier, the water level in the vicinity

[7] Plaintiffs claim that the damages they seek are for erosion to their "fast" lands above the OHWM. Flowage easements were acquired from plaintiffs covering lands above the OHWM (*see* note 6, *supra*). In view of the fact that compensation was paid to plaintiffs for these flowage easements, *i.e.*, they were not gratuitous conveyances, plaintiffs' right, absent other considerations (*see* note 11, *infra*), to recover for erosion damages within the flowage easement areas is most doubtful. *See Stockton* v. *United States*, 214 Ct. Cl. 506, 515–18 (1977). There is no reliable evidence of overreaching or actionable misrepresentation on the part of Corps personnel in obtaining these flowage easements. As noted by the court in *Stockton* v. *United States*, *supra*, 214 Ct. Cl. at 515, defendant's acquisition under normal conditions, which is the situation herein, of a flowage easement, "• • • would not carry with it any warranty that the water would always be smooth. If the impounded water were wide enough for waves to build up, and if the land were easily erodible, it would be up to the owner to exact compensation for the added exposure, or else to protect himself by riprapping or other engineering measures • • •." The language to be found in flowage easement acquisition documents, *e.g.*, warranty deeds and stipulation of the parties attest to the fact that the compensation paid for said flowage easements was in full satisfaction of any and all

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of the riparian land of one plaintiff, Dickenson, was not raised. It is important to note that plaintiffs contend that wave action is the mechanism, or cause, of the erosion on their properties. There is no support in this record for plaintiffs' bald allegation in their brief that the groundwater table, which plantiffs assume is directly related to the rise in pool water level, weakened the banks and made them more susceptible to wave action and slumping. The record indicates that one cannot presume that merely because the pool level was raised the water table on adjoining land must also be deemed to have been raised. In some areas the water table may have been raised whereas in other areas the water table may not have been raised. In maintaining that the involved structures were directly and proximately responsible for the erosion damage on their banks, the burden of proof rests on plaintiffs, and not on the defendant, to establish that a taking has occurred justifying the payment of just compensation. *United States* v. 329.05 *Acres of Land*, 156 F. Supp. 67, 71 (S.D. N.Y. 1957), *aff'd* 263 F.2d 331 (2d Cir. 1959); *see United States ex rel. T.V.A.* v. 137 *Acres of Land*, 406 F.2d 1283, 1287 (6th Cir. 1969).

The trial session in these cases was lengthy and the trial record voluminous, facts confirmed by the extensive findings of fact accompanying this opinion. The factual conclusions reached herein are more fully discussed in those detailed findings.

The plaintiffs who did testify in these cases established clearly that erosion, in varying degrees, was taking place on their riverbank properties. Defendant concedes this fact. However, it must be borne in mind that "[p]roof of damage alone does not necessarily prove a taking." *Yazel* v. *United States*, *supra*, 118 Ct. Cl. at 72. As to the cause of the erosion, the testimony of plaintiffs, to the extent that the matter of causation was addressed by them, was to the effect that the erosion on their riverbanks was not a problem until after the dams were constructed and the water impounded. Accordingly, they reason, the high-lift dams must be responsible for the

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claims arising out of said taking. The testimony of the plaintiffs indicates their awareness of erosion potential at or about the times the flowage easements were being acquired. There is no evidence in this case of express reservations by plaintiffs herein for any future erosion damage to their lands. *Compare Tri-State Materials Corp.* v. *United States*, 213 Ct. Cl. 1, 4, 550 F.2d 1, 3 (1977).

erosion. This "post hoc, ergo propter hoc" (after this therefore on account of this) approach to causation is most unpersuasive in the context of this record.[8] It is an approach that was rejected in *Yazel* v. *United States*, *supra*, 118 Ct. Cl. at 70–73, where riparian landowners maintained that the bank line of their land had been previously stable, but that after the construction of a levee by Army Engineers many acres of the bank lands were eroded away, all of which, the landowners claimed, was the result of the construction of the levee.

Erosion on rivers and streams is an extremely complex matter from the point of view of its genesis, its effects and its prevention. Why some banks erode and other similar ones do not is not fully known. A number of variables are involved in the erosion process and these variables may exert their influence individually or in a complex combination, in which case erosion becomes more difficult to understand, predict and treat. In short, the cause(s) of erosion cannot be reduced to simple answers. As a result, these are cases where the testimony of experts is particularly appropriate since the trier of fact is presented with evidence of a highly technical nature involving geotechnical, hydrologic, hydraulic, geological and climatic matters. *See Gisriel* v. *Uniroyal, Inc.*, 517 F.2d 699, 702 (8th Cir. 1975).

Plaintiffs engaged as their sole expert witness, Dr. Wayne R. Lowell (Lowell), a retired geology professor, who, at time of trial, was a consulting geologist involved primarily in the exploration of mineral deposits. He had no professional expertise in river mechanics. Lowell was engaged to serve as an expert some 3 to 4 weeks before trial. He readily conceded that time constraints precluded a thorough and detailed investigation of matters germane to the opinion he advanced at trial that the raising of the water level by impoundment of the river by the dams in question was directly responsible for the erosion on plaintiffs' banks. Lowell's testimony indicates that he considered the construction of the high-lift dams and attendant pool rises as the sole causative factor for the erosion on the plaintiffs' banks and that he failed to give

[8] The record suggests that plaintiffs generally were really not attentive to river action on their banks prior to construction of the involved dams. However, after the dams were constructed their attention became more concentrated on their banks in anticipation of erosion problems. It seems clear that erosion in varying degrees was taking place on riverbank properties in these pool areas prior to construction of the dams.

reasonable consideration to other clearly shown possibilities which might serve to explain said erosion on these banks.[9] Lowell's opinion was, at best, a naked one, lacking supportive empirical data and study. It has been observed that opinion evidence is only as good as the facts upon which it is based. *State of Washington* v. *United States*, 214 F.2d 33, 43 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954). *See also United States* v. *Sowards*, 370 F.2d 87, 92 (10th Cir. 1966). Accordingly, Lowell's opinion as to erosion causation was not very helpful to the trier of fact and was deemed unpersuasive.[10]

Lowell testified that 99.5 percent of bank erosion on a river takes place during periods of floods or high water. All of defendant's experts agreed that over 90 percent of riverbank erosion is caused by floods or high water. The testimony of some of the plaintiffs clearly supports these views of the experts. Lowell ostensibly believed, incorrectly it might be added, that the construction of the high-lift dams increased the frequency of floods. Otherwise, his testimony above is definitely at odds with the opinion he offered that the rise in

[9] Lowell visited the banks of only three plaintiffs. The banks of these three plaintiffs were located in the Cannelton pool in areas that were historically unstable and subject to landslides. The record establishes that the slipping and sliding of the banks of these plaintiffs was due primarily to the inherent instability of the colluvial soils as aggravated by climatic conditions and was not due to the raising of the water level by dam impoundment. Lowell did not visit any other site in the Cannelton pool, nor did he visit any site in the Meldahl or Newburgh pool. Lowell conceded he had never been in the Meldahl pool and was unfamiliar with said pool area. Instead, Lowell reviewed 1977 photographs, placed in evidence by defendant, of the banks of the other plaintiffs and concluded from the erosion depicted in said photographs that said erosion reflected therein was caused by the raising of the water levels in the involved pools. Lowell made no study of the matter; he did not review any hydrological, hydraulic, soils, or climatic data in reaching his opinion. He conceded such data would have been helpful in reaching an opinion on the matter. Lowell was unable to explain why erosion in the upper 20 percent of the Cannelton pool where the water level was not raised at all despite the construction of the dam was similar to the erosion in the lower portions of the pool where the water level was raised up to 25 feet in places. Such facts suggest most strongly that erosion causes, other than the raising of the water level by dam impoundment, were at work in the pool areas.

[10] Lowell was undoubtedly influenced by the conclusions reached in an August 1977 Water Resources Development Report on the Missouri River prepared by the Corps of Engineers, Missouri River Division, which he relied on in reaching his opinion, to the effect that the construction of large hydroelectric flood control dams on the Missouri River was responsible, in some measure, for the erosion which occurred on the banks of said river. Lowell had no working relationship, nor personal familiarity with the Missouri River. The record establishes, however, that this report harbors little relevance to the operation and impact of the high-lift navigation dams on the Ohio River. One of defendant's witnesses, Daryl B. Simons, a creditable and experienced expert in the field of erosion, sedimentation, river mechanics and related problems, had worked on the Missouri River and persuasively explained that the Missouri River Dam system was totally different from the Ohio River Dam system such that one could not extrapolate conclusions from the Missouri River Dam system and its effect on riverbank erosion and have them applicable to the Ohio River Dam system.

pool levels was the primary cause of the erosion on the plaintiffs' riverbanks. Lowell believed that the energy (velocity) of a river brings about all erosion and that this energy, which can be reflected in the rate of river flow, is greatest at times of high flow or floods. Since, as has been indicated previously, the high-lift dams exercise no control over the river during periods of flood or high river flow, it seems reasonable to conclude that most of the erosion damage on the plaintiffs' banks is not due to the impoundment of the river but is due to floods and high water. Because these floods or high waters would have occurred absent the presence of the high-lift dams, there is strong reason to find that the erosion plaintiffs complain of is not related to or caused by the construction and operation of the dams in question. *See Yazel* v. *United States, supra*, 118 Ct. Cl. at 70–71; *Coates* v. *United States, supra*, 124 Ct. Cl. at 811–12.

As indicated earlier, plaintiffs contend that wave action, wind and tow and/or barge, was the primary mechanism for erosion on their banks. Lowell initially testified in a most generalized manner, that the erosion complained of was caused by undercutting of the banks by wave action. This opinion of Lowell's was not supported by any study or data. Too, it must be remembered, he only visited the sites of three of the 23 plaintiffs, and he never talked to a single plaintiff relative to conditions on their banks. Factual support for his opinion in this regard is clearly lacking, and his opinion, as a result is entitled to little weight. *See State of Washington* v. *United States, supra*. Later, in his testimony, Lowell conceded that wind-generated waves were not too important as an erosion causing factor in these cases. Studies conducted by defendant, which were available to Lowell but were not reviewed by him because of time constraints, established, *inter alia*, the fetch conditions (distance for waves to build up) pertinent to each of the banks in issue and suggest rather persuasively that wind wave action had no significant erosive effect on these banks. As to river traffic waves, Lowell admitted that generally the force of these waves might well be dissipated before they hit the shoreline. The record does suggest that, to the extent river traffic operated close to the shoreline, waves generated by such traffic could have some impact on the shoreline. It is conceded that raising the water level in the pool by impoundment enabled river traffic, in

some instances, to come closer to the shoreline than was the case prior to impoundment. However, there is no evidence in the record of the frequency and/or impact of such occurrences as to each of the properties in issue. Such testimony as is in the record relating to river traffic and its potential for erosion is most generalized and lacking in specificity.[11]

In contrast to plaintiffs' approach to the issue of erosion, which can be characterized as generalized and lacking in investigative detail and study, defendant, through the Corps, engaged in a comprehensive and most detailed study of erosion throughout the Cannelton and Meldahl pools in general and on each of the plaintiffs' properties in particular. While the impetus for this study undoubtedly was the instant litigations, the scope of the study itself was much broader. The study was directed at system mechanics and basic causes of erosion along Ohio River banks. The Corps was as interested as the litigants in knowing whether the navigation dams were responsible for the erosion of riparian lands on the Ohio River. It might be added that the Corps, as attested to by its study report on the Missouri River, referred to previously, was not adverse to attributing erosion to Corps' dams if the facts, as determined by an appropriate study, showed this to be the case. The findings of fact set forth in great detail the nature and scope of this study. This study, which covered a wide range of various disciplines, was conducted by professional and competent personnel, and engendered in the trier of fact a sense of reliability and fairness. Suffice it to say, that defendant's investigative study, resulting data, and conclusions drawn therefrom are entitled to great weight in resolving the erosion issue now before the court. The bottom line of the study was that the erosion taking place on plaintiffs' riparian lands was not

[11] The size of the waves hitting their riverbanks at normal pool stage, as suggested in the testimony of plaintiffs, was not such as to cause the significant erosion damage taking place on the high banks about which plaintiffs complain. The distance from the land-water interface at normal pool stage to the high bank erosion areas was such that wave action could not reach these areas. More importantly, waves generated by floods and high water would have occurred on the banks at higher levels absent the construction of the dams. The record supports the view that any wave-generated erosion, whether by wind or river vessel, would be insignificant and subsumed by the erosive forces of high waters or floods which would have occurred absent the dams. Such a conclusion also serves to dispose of plaintiffs' contentions regarding shoreline armoring and tree and sandbar protection. Accordingly, wave action has not been shown to be a substantive erosion factor significantly attributable to the construction and operation of the dams in question. *See Yazel* v. *United States*, 118 Ct. Cl. 59, 71-73 (1950); *Coates* v. *United States*, 124 Ct. Cl. 806, 811-15 (1953).

caused by or related to the construction and operation of the high-lift navigation dams in issue.

Defendant presented a number of expert witnesses. The chief consulting experts engaged by defendant were Dr. D. Joseph Hagerty (Hagerty), Dr. Daryl B. Simons (Simons) and Dr. Stanley A. Schumm (Schumm).

Hagerty, at time of trial, was an associate professor of civil engineering and an associate in the Department of Geology at the University of Louisville in Louisville, Kentucky. In addition to his teaching responsibilities, Hagerty performed engineering consulting work. For example, he was retained, as part of a study group, to investigate geological aspects of groundwater flow in Jefferson County, Kentucky, particularly downtown Louisville in 1972 and thereafter. He was also involved in the preparation of environmental impact statements for the Corps relative to establishment of the pools of the Cannelton, Newburgh and McAlpin Locks and Dams on the Ohio River. As a result, Hagerty had a working familiarity with the Ohio River prior to 1977, when he was engaged by the Corps to head up the erosion investigative study team.

Hagerty was a knowledgeable, well-informed, well-prepared and creditable witness. In his approach to the matter of erosion, Hagerty considered all possible causes for the erosion which was taking place on plaintiffs' banks, including the high-lift dams.[12] After consideration of the mass of data assembled by the study investigation group, and having viewed firsthand each of the plaintiffs' riverbank properties,[13] and having conducted reconnaissance of the entire

[12] Hagerty believed that the major cause of the erosion in question was high water or floods. Floods, annual occurrences on the Ohio River, saturated the banks. The velocity of river currents during flood periods created erosive forces which removed and/or reworked materials on said banks. When flood waters receded, materials were rendered subject to slumpage and erosion by a process called drawdown. Another important erosion cause or mechanism, noted by Hagerty, taking place on some of the banks was piping. This concept described the flow of groundwater preferentially through pervious layers of bank materials on a gradient from the land to the river, exiting at the face of the banks taking with it bank materials. On still other sites, Hagerty noted landslide conditions which were responsible for bank slippage and sliding, which conditions were exacerbated by the wet climatic conditions of the early 1970's. Hagerty also noted that the urban and agricultural uses of the properties in many cases contributed to the erosion process by the introduction of water onto the properties which thereafter flowed toward the river with some erosive ramifications.

[13] Hagerty inspected all of the plaintiffs' riparian lands. Indeed, he inspected all but one site at least twice. He offered his opinions as to the causes of the bank erosion taking place on each of these sites (*see* note 12, *supra*). His opinion, as to each site where the rise in water level was claimed to be the cause of the erosion, was that the rise in pool level

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Cannelton and Meldahl pools,[14] and having monitored selected riverbank properties, by piezometers and otherwise, Hagerty offered the opinion that the erosion taking place on each of the claimant's riverbanks was not caused by or related to the construction of the Cannelton, Meldahl and Newburgh navigation dams. Hagerty's opinions, on this record, are entitled to great weight.

Simons, at time of trial, headed up all research projects at Colorado State University. Prior to acceptance of that position, Simons had been involved in the civil engineering field, with emphasis on problems, *inter alia*, of erosion, sedimentation, river mechanics and related matters, as a professor at the University of Wyoming and as an employee at the United States Geological Survey. He has worked on research projects on domestic, *e.g.*, the Mississippi, Missouri and Colorado rivers, and international rivers, *e.g.*, the Nile River. Simons testified as an expert on hydraulic and sedimentation matters.[15] Simons was a knowledgeable, experienced, informed and creditable witness.

Simons personally visited the sites of all the plaintiffs except those of plaintiffs Skelton and Tolliver. He also surveyed the Cannelton and Meldahl pool areas generally. He reviewed the study data, especially the hydrological data, assembled by the Corps, and prepared a report setting forth

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was not responsible for said erosion. As to the Dickenson propepty, where there was no rise in pool level, Hagerty was of the opinion that the soil materials in the banks were most susceptible to erosion which was aggravated by land use on the property and lateral water flow on a gradient from the land through the bank, pulling materials therefrom to the river. He also noted that the area of erosion on the Dickenson banks was some 40 to 60 feet from the water's edge in an area that reflected drainage problems. Hagerty's opinions were deemed well presented, supported by the record, and persuasive.

[14] Hagerty noted in his investigation that erosion was taking place on high banks some distance from the land-water interface of the normal pool stage. He noted that erosion was taking place on riverbanks in the Cannelton pool in areas where there was no rise at all in the level of the water. In other areas where the land-water interface was protected by armoring, erosion was occurring higher up on the riverbanks. These were also areas in the Cannelton pool where the water level was raised where no erosion was occurring at all. Similarly, in areas of the Meldahl pool when the rise in water level was only 2 feet, the erosion noted in said areas was comparable to the erosion taking place in areas of the Meldahl pool where the rise in water level was close to 30 feet.

[15] Simons' professional experience in matters of sedimentation and his analysis of available Ohio River data gives added weight to his conclusion that the construction of the high-lift dams did not result in a build-up of sedimentation in the Ohio River, a conclusion contrary to one reached by Lowell who did not rely on any Ohio River data or investigation. In Simons' opinion, sediment in the Ohio River system at the present time is transported for all practical purposes in exactly the same way it was transported before navigation dams were installed on the Ohio River. Simons also persuasively refuted Lowell's contention that after the high-lift dams had impounded the water, the created pools had characteristics of glacial lakes.

his conclusions and supporting reasons. A report on his findings and conclusions relative to the erosion matter in issue was in evidence. The totality of the testimony and the report of Simons supports the conclusion that the erosion on the plaintiffs' banks was not directly caused by or significantly related to the construction and operation of the high-lift dams in issue.[16]

Schumm obtained a Ph. D. in geomorphology from Columbia University in 1955, with emphasis on drainage and erosion patterns and problems. He worked for the United States Geological Survey for 12 years, dealing most of the time with erosional problems in the western United States. Since 1967, Schumm has served as a professor of Geology at Colorado State University, in its Department of Earth Resources, where he spends half his time teaching and the other half in research work. In the course of his professional work, Schumm had studied a number of rivers, *e.g.*, the Mississippi, Arkansas, Platte, Yellow and Cimarron rivers. He was eminently qualified to offer expert opinions on river matters, especially erosion.

Schumm visited the riverbank sites of all the plaintiffs except Tolliver and Skelton, and, as to those two sites, he did look at riverbanks generally in the areas where those two properties were located. He also spent 4 days in making a general reconnaissance of the Cannelton and Meldahl pools by boat, and another day in making a reconnaissance over the river by helicopter. In these reconnaissance efforts, which gave Schumm a broad overview of general river conditions, Schumm noted that while some banks in these pools were eroding, other banks, that had suffered from past erosion, were healing and stabilizing by vegetation regrowth and sediment deposition, and still other banks were completely stable. He noted that erosion within the pools was varied, *i.e.*, it was not confined to any specific area. He observed that

[16] Simons agreed with Lowell that some 99.5 percent of erosion that occurs on riverbanks results from high water or flood conditions. He also observed that when the flow of the Ohio River reached 325,000 cubic feet per second (cfs), reflecting flood conditions, the high-lift dams on the Ohio River exercised no control over river flow or its velocity (*see* text at page 11, *supra*). As to the protection offered by sandbars and armoring to erosion from waves, Simons observed that sandbars were transient things which were created by river action and changed and removed by river action. He viewed sandbars, armoring, etc., as inadequate protective devices against river erosion during periods of floods since the high waters with attendant high velocities operate against the high banks above these sandbars and armored sites.

erosion similar to that taking place on plaintiffs' banks was also taking place in those areas of the Cannelton pool where the water had not been raised at all and in those areas of the Meldahl pool where the water rise was only 2 feet. He further observed that most of the erosion on plaintiffs' banks was taking place at elevations significantly above the normal level of the pools, *i.e.*, some distance away from the land-water interface at normal pool. During his investigations of the pools in question, Schumm saw no significant evidence of wave action as a causative factor for the erosion he noted on the riverbanks of plaintiffs. Schumm prepared a report containing his findings and conclusions on the erosion matter in issue.

Schumm discussed each of the plaintiffs' properties in issue, including the Tolliver and Skelton sites which he did not personally visit but which were in areas which he did view and observe. He agreed with the other experts that most of the bank erosion on rivers, including the Ohio River, takes place during periods of floods when the velocity of flow is highest. He also reviewed the mass of data assembled by the Corps' investigative study, including the soils and hydrological data, as well as other pertinent data in the record. Schumm concluded, after his study of the matter, that there was no direct and significant relationship between the raising of water levels of the Cannelton and Meldahl pools and the erosion taken place on the properties of plaintiffs. He also gave his opinion of the most probable causes of the erosion taking place on plaintiffs' banks. In general, he corroborated Hagerty's views as to the most probable causes of the erosion taking place at those sites. Schumm's opinions and conclusions are entitled to considerable weight.

While there are many areas of conflict and dispute in the record, all the experts in these cases agreed on one significant fact, *i.e.*, that over 90 percent of the erosion that occurs on rivers and streams is due to flood conditions. Since it has been accepted herein that the high-lift dams do not increase the frequency, duration or peaks of the floods on the Ohio River, it follows that the erosion on plaintiffs' banks most probably would have occurred absent the construction and operation of the high-lift dams. *United States* v. *Sponenbarger*, 308 U.S.

256, 266 (1939); *Yazel* v. *United States, supra*, 118 Ct. Cl. at 71 and 73;[17] *see Coates* v. *United States, supra*, 124 Ct. Cl. at 812.

As noted earlier, plaintiffs have the burden of proving, by a preponderance of the evidence, that the construction and operation of the navigation dams in issue were the direct and proximate cause of the erosion damages suffered by them on their riparian banks. *United States ex rel. T.V.A.* v. 137 *Acres of Land, supra; United States* v. 329.05 *Acres of Land, supra.* Plaintiffs, on this record, have failed to carry their burden in this regard. Their erosion claims must be denied.

III.

Plaintiffs contend that in the acquisition of flowage easements in connection with the Meldahl and Cannelton Dam projects, the Corps was guilty of fraud and misrepresentation.[18] Plaintiffs use the terms "fraud" and "misrepresentation" most loosely and in a very generalized manner in attacking various actions of the Corps which were pursued in the Corps' flowage easement acquisition programs. In their proposed findings of fact, plaintiffs set forth a barrage of charges against the Corps which they proffer as proof of fraud and misrepresentation. Each of these charges has been covered, and found lacking in merit, in the findings of fact which accompany this opinion.[19] Accordingly, this opinion

[17] There are significant parallels between the *Yazel* case and the instant litigations. The circumstances in both litigations involve the construction of governmental structures on an alluvial river, one of the characteristics of which is erosion of its banks, which is subject to annual floods. The court in *Yazel* noted that the banks of such a river, even if stable for many years may, after prolonged exposure and saturation due to flood conditions, suddenly collapse. The court in *Yazel* also noted that a survey of the involved Kansas River in 1940 indicated that 40 of the 160 miles of said river were active in various degrees of erosion (118 Ct. Cl. at 69). These observations have pertinent applicability to the instant litigation. The court in *Yazel* was not impressed with the contention of plaintiffs therein that their banks were stable before the structure (a levee) was built so the erosion that occurred on their banks afterwards must have been due to the construction of the structure (118 Ct. Cl. at 70-71). In both litigations it was shown that floods were the primary cause of the erosion (118 Ct. Cl. at 71-73). In both litigations it was not satisfactorily established that the accused structures increased the frequency, duration or peaks of floods (118 Ct. Cl. at 71). The denial of the erosion claims in the *Yazel* case supports the denial of the erosion claims in this litigation.

[18] As noted previously, a flowage easement was not acquired from plaintiff Dickenson whose property was located in the Newburgh Dam pool. As a result, there is no basis for a claim of fraud and misrepresentation against the Corps on the part of Dickenson.

[19] For example, there was nothing improper with the Corps advising riparian landowners affected by the projects of the government's right of condemnation in connection with flowage easement acquisitions. *Beatty* v. *United States*, 144 Ct. Cl. 203, 205-07, 168 F. Supp. 204, 206 (1958). Further, with respect to the applicability of state law relative to the preparation, execution and recordation of the flowage easements in

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will discuss only those specific contentions of fraud and misrepresentation which plaintiffs deemed important enough to highlight in their briefs.

With reference to the acquisition of flowage easements, which underscores plaintiffs' claims of fraud and misrepresentation, it is necessary to separate plaintiffs into three categories. In the first category are those plaintiffs who, after successful negotiations, conveyed flowage easements to the Corps by warranty deed;[20] in the second category are those plaintiffs from whom, after unsuccessful negotiations, flowage easements were acquired by district court judgments on declarations of taking;[21] and in the third category are those plaintiffs who obtained the properties in issue after the flowage easements in issue were acquired by the Corps.[22]

Fraud has been defined as conscious wrongdoing with an intention to cheat or be dishonest. *United States* v. *Wunder-*

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issue, it is sufficient to note the federal law, not state law, controls. *Kohl* v. *United States*, 91 U.S. 367, 374 (1875). *See United States* v. *Haddon*, 550 F.2d 677, 682 (1st Cir. 1977); *see also Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366–67 (1943). Finally, with respect to plaintiffs' constant reference to federal assistance programs covering federal, state and local riparian landowners to protect against bank erosion by riprap and other measures, it is worth noting the observation of the Supreme Court in *United States* v. *Willow River Co.*, 324 U.S. 499, 502 (1945) that "[i]f damages from any other cause [than a taking] are to be absorbed by the public they must be assumed by act of Congress and may not be awarded by the courts."

[20] Plaintiffs Bynon, Cox, Cunningham, J. McGehee and E. McGehee. Since Cunningham did not testify, there is, in any event, no basis herein for a claim of fraud and misrepresentation against the Corps as to the acquisition of a flowage easement on his property.

[21] Plaintiffs Loesch, Glenn (Tract 2218 E and 2410 E), Poston, Purcell, Schwab and Skelton. Since Poston and Skelton did not testify, there is, in any event, no basis for a claim of fraud and misrepresentation against the Corps as to the acquisition of flowage easements on their properties. There is no contention here that the district courts lacked jurisdiction or that their judgments on these matters are invalid. *See Evers* v. *Watson*, 156 U.S. 527, 531 (1895). The record herein will not support any charge of fraud sufficient to set aside these judgments. *See Evers* v. *Watson*, *supra*, 156 U.S. at 533–34. Under such circumstances *res judicata* would seem to bar these plaintiffs from relitigating herein matters subsumed in the district court judgments. *See Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Oglethorpe Co.* v. *United States*, 214 Ct. Cl. 551, 557, 558 F.2d 590, 594 (1977). *Cf. Vanada* v. *United States*, 202 Ct. Cl. 1121, 1122–23 (1973). Unfortunately, the parties did not address this *res judicata* point in any helpful manner in their briefs.

[22] Plaintiffs Chouinard, Eaton-Williams, Glenn (Tract 2215 E), Griffith, Leatherbury, McNelly, E. Rice, C. Rice, Tolliver, Wagner, and Wood. Since the Corps had no dealings with these plaintiffs in the acquisition of the flowage easements in issue, there is no basis for any claim of fraud and misrepresentation against the Corps on the part of these plaintiffs. Further, the record is devoid of any reliable evidence as to fraud and misrepresentation relative to the acquisition of flowage easements on these properties. Finally, since these plaintiffs did not own the properties in question at the time the flowage easements thereon were acquired by the Corps, they are not the persons entitled to compensation if, in fact, additional compensation is due relative to said flowage easement acquisitions. *United States* v. *Dow*, 357 U.S. 17, 20 (1958); *Lacey* v. *United States*, 219 Ct. Cl. 551, 560, 595 F. 2d 614, 619 (1979).

lich, 342 U.S. 98, 100 (1951). It is important to note that there is a presumption that public officials, *i.e.* Corps personnel, perform their duties in a proper manner. *Sun Oil Co.* v. *United States*, 215 Ct. Cl. 716, 746, 572 F.2d 786, 805 (1978). A charge of fraud must be substantiated by clear and convincing proof rebutting every presumption of honesty and fair dealing. *DuBois Constr. Corp.* v. *United States*, 120 Ct. Cl. 139, 175, 98 F. Supp. 590, 597 (1951). The degree of proof necessary to establish fraud demands more than a preponderance of the evidence, it demands "clear and convincing" evidence. *Hageny* v. *United States*, 215 Ct. Cl. 412, 428, 570 F.2d 924, 933 (1978). Further, fraud will not be presumed, and it must rest on something more substantial than suspicion, speculation, or a hint of fraud. *Hageny* v. *United States*, *supra*, 215 Ct. Cl. at 436, 570 F.2d at 937. There is no reliable evidence in this record which would support a charge that the Corps, in acquiring flowage easements from plaintiffs engaged in conscious wrongdoing with an intent to cheat or be dishonest with them. Such evidence that is present in the record reflects an honest effort by the Corps to be fair and forthright with all riparian landowners, including plaintiffs, in all matters relating to the dam projects. *Cf. Kirkendall* v. *United States*, 90 Ct. Cl. 606, 614, 31 F. Supp. 766, 770 (1940). Plaintiffs have failed to carry the heavy evidentiary burden placed upon them relative to the fraud charges they have raised in this litigation. *See Law* v. *United States*, 195 Ct. Cl. 370, 440–53 (1971); *Eastern School* v. *United States* 180 Ct. Cl. 676, 694–98, 381 F.2d 421, 431–34 (1967).

It would appear that the misrepresentation plaintiffs deem actionable herein consists of allegations that the Corps knowingly made false representations to plaintiffs in order to induce plaintiffs, in reliance on said false representations, to enter into flowage easement agreements or to otherwise accept the flowage easements without protest or without seeking additional compensation to their detriment and damage. *See LaCrosse Garment Mfg. Co.* v. *United States*, 193 Ct. Cl. 168, 175, 432 F.2d 1377, 1381–82 (1970).

While not clearly spelled out in their briefs, plaintiffs ostensibly contend that the Corps represented that the high-

lift dams, especially the Cannelton Dam, would eliminate erosion problems;[23] that the Corps knew, or should have known, that erosion would occur as a result of construction of the high-lift dams because of experience it had with the low-lift dams;[24] and that plaintiffs relied on the Corps' representations in entering into the flowage easement agreements.[25] The facts of record will not support these contentions.

The record indicates that there were discussions between the Corps and some of the plaintiffs relative to the problem of erosion. As might be expected, there is conflict in the recollections of the witnesses on both sides as to what was said on the matter. The record suggests that any discussions by Corps personnel with plaintiffs on the matter of erosion manifested at best expressions of opinion or expectation

[23] Corps personnel did advise plaintiffs that raising the water level on the banks would tend to stabilize the banks up to the water level because of the weight of the water against the banks, a view supported by the experts who testified in this litigation. Plaintiffs were also advised that the high-lift dams would reduce, at normal pool levels, the velocity of flow in the river, a view also supported by the experts in this litigation. Corps personnel made no representations that erosion would be eliminated as a result of the construction of the high-lift dams. There were absolutely no statements by Corps personnel that the high-lift dams would reduce the frequency, duration or peaks of floods on the Ohio River, and plaintiffs do not aver that any were made, and these matters are the crucial determinative factors in these cases, as was noted previously in this opinion.

[24] The record does not indicate the Corps had any problems with the low-lift dams, particularly with respect to riverbank erosion. The testimony of Corps personnel does not show that they anticipated, or should have anticipated, erosion problems because of the construction of the high-lift dams. The record indicates that erosion on rivers and streams is most unpredictable, a fact confirmed by the testimony of the experts. This unpredictability certainly weakens plaintiffs' contentions as to what the Corps knew or should have known as to erosion on any particular piece of property. Hooper, one of the Corps' negotiators with landowners in the flowage easement acquisition program, testified that when erosion questions were raised by landowners he advised them that he did not know whether there would be erosion in the future, and that he did not know whether present erosion would continue and/or increase. The Corps had no special knowledge as to when floods would occur in the future, or which riverbanks would erode and which would not erode. The circumstances in these cases do not fit into the mold of those government contract cases cited by plaintiffs, *e.g.*, *Helene Curtis Indus., Inc.* v. *United States*, 160 Ct. Cl. 437, 443–45, 312 F.2d 774, 778–79 (1963), which hold that where the government possesses special knowledge, not known to a contractor, which is vital to performance of the contract, the government has an affirmative duty to disclose such knowledge to the contractor. Interestingly, there was testimony from some of the plaintiffs that they expected erosion to occur as a result of the dam projects. Under these circumstances, the cases relied on by plaintiffs work against them. *See Helene Curtis Indus., Inc.* v. *United States*, *supra*, 160 Ct. Cl. at 446, 312 F.2d at 779; *see also*, *L. M. Jones Co.* v. *United States*, 178 Ct. Cl. 636, 653–54 (1967).

[25] The record supports the view that plaintiffs did not rely in any significant manner on any statements about erosion by Corps personnel relative to acquisition by the Corps of flowage easement. This is certainly true with respect to those plaintiffs from whom flowage easements were obtained by condemnation (*see* note 21, *supra*) or those plaintiffs who acquired properties after the flowage easements were obtained (*see* note 22, *supra*). As to other plaintiffs who negotiated with the Corps and conveyed flowage easement warranty deeds to the Corps (*see* note 20, *supra*), some flatly testified they did not believe anything Corps personnel said relative to the problem of erosion.

given in circumstances which must have identified them as such, rather than flat representations of fact. Such discussions will not support a claim for misrepresentation. *See Aerojet-General Corp.* v. *United States*, 199 Ct. Cl. 422, 432–33, 467 F.2d 1293, 1299–1300 (1972); *Phillips Petroleum Co.* v. *Rau Constr. Co.*, 130 F.2d 499, 501 (8th Cir. 1942). Synthesizing the matter, the record supports the view that Corps personnel made no actionable representations that erosion problems would be eliminated or reduced by the construction of the high-lift dams.

a) Aerial Surveys

In their briefs, plaintiffs contend that the Corps utilized aerial surveys which, they seem to say, produced data that was inaccurate and unreliable. Plaintiffs seem to imply that the Corps deliberately used aerial surveys knowing that such a procedure would produce results which would enable the Corps to pay less for more flowage easement land by means of inaccurate descriptions of said easements. Plaintiffs do not say whether these allegations are grounded on a claim of fraud or on a claim of misrepresentation. There is no evidence in the record which will support such allegations.

In obtaining information for the preparation of flowage easement documents, the Corps relied, *inter alia*, on aerial surveys of the riverbank areas of the Cannelton pool by a reputable and experienced firm. By a process called photogrammetry, photographic data from the aerial surveys was converted into maps with appropriate contour and elevation data. United States Geological Survey maps are prepared in this same manner. The accuracy of these maps conformed to that required by the National Standards of Map Accuracy. These maps were subsequently field checked for accuracy and any discovered errors were corrected before the data was utilized by the Corps.

Plaintiffs challenge the use of these aerial surveys in preparing the legal descriptions describing the flowage easements taken on plaintiffs' properties. The essence of their complaint is that the accuracy of the photogrammetric

process has not been authenticated at each step by appropriate individuals.[26] Plaintiffs, in my mind, have raised an immaterial issue. The question, regardless of how it was done, is whether the descriptions set forth in the acquisition documents accurately reflected and described the flowage easements taken from plaintiffs. The only reasonable answer that can be drawn from this record is an affirmative one. Plaintiffs have failed to prove that the flowage easement descriptions as to each property in issue were erroneous. It is found, instead, that the Corps has, in fact, accurately described the various lands in which it intended to, and did, take flowage easements. *See* in this regard *United States* v. 21.54 *Acres of Land*, 491 F.2d 301, 305 (4th Cir. 1973).

b) Ordinary High Water Mark

Plaintiffs claim that the ordinary high-water mark determinations, reflected as m.s.l. elevation figures in each flowage easement document in issue, were erroneous and therefore entitles them to additional just compensation for resulting additional flowage easement takings (*see* note 3, *supra*).[27] There is no reliable evidence in the record that the Corps' OHWM determinations as to each property in issue were erroneous. Plaintiffs have failed to carry their burden in this regard and their erroneous OHWM contentions are accordingly rejected. *See United States* v. 329.05 *Acres of Land, supra; United States ex rel. T.V.A.* v. 137 *Acres of Land, supra.*

[26] Plaintiffs contend, for example, that in order for the aerial survey results to have any efficacy, the aerial photographer would have to certify as to the camera lens setting, the person plotting the elevations and establishing contours would have to certify as to their accuracy, etc. Since this was not done, plaintiffs seem to argue, the data obtained from the survey must be deemed unreliable and therefore the flowage easement descriptions, which were based in some way on the aerial survey procedure, must be deemed inaccurate and unreliable. Plaintiffs' contention might have had some merit had the validity of the legal descriptions of the flowage easements been challenged by the results of an actual survey by a competent surveyor. This is the thrust of *Roads* v. *Virginia-Florida Corp.*, 476 F.2d 82, 84 (1973) relied on by plaintiffs. As this record now stands, there is no reliable and persuasive evidence that the flowage easement descriptions in issue are inaccurate or otherwise unreliable.

[27] Obviously those plaintiffs who acquired the properties in issue after the flowage easements were acquired would not be entitled to additional compensation for any such additional takings in any event (*see* note 22 and text, *supra*). Further, those plaintiffs whose flowage easement takings resulted from district court judgments have not shown any reason why *res judicata* should not bar their claims (*see* note 21 and text, *supra*). The district courts have jurisdiction to determine any such OHWM dispute. *See United States* v. 21.54 *Acres of Land*, 491 F.2nd 301, 306-07 (4th Cir. 1973); *Vanada* v. *United States*, 202 Ct. Cl. 1121, 1122 (1973).

While not clear in their briefs and findings, plaintiffs ostensibly feel that the use of an erroneous OHWM by the Corps in these flowage easements was known, or should have been known, to the Corps at the time they were acquired, and thus constituted fraud and/or misrepresentation on the part of the Corps in obtaining easements from them under such circumstances.[28] There is absolutely no evidence in the record to support these feelings, beliefs or allegations.

In their briefs, plaintiffs contend that the OHWM on the entire Ohio River is patently defective. Plaintiffs cite three cases in which, they say, courts have concluded that OHWM determinations by the Corps in certain Ohio River pool areas were defective. The cited cases are *Tri-State Materials Corp.* v. *United States*, 213 Ct. Cl. 1, 550 F.2d 1 (1977) (Racine Locks and Dam); *United States* v. 21.54 *Acres of Land*, *supra*, (Hannibal Locks and Dam); and *Vanada* v. *United States*, *supra*, (Newburgh Locks and Dam).[29] A reading of the first two cases discloses that the courts in those two cases did not find that the OHWM determinations of the Corps in those pool areas were erroneous or incorrect. Indeed, there were no determinative decisions involving the correctness of the OHWM in those two cases. The third cited case, as indicated

[28] Plaintiffs in their briefs argue that, in any event, a mutual mistake of fact exists as to the correct OHWM and therefore the court should reform each flowage easement document to reflect said correct OHWM, citing *Higgs* v. *United States*, 212 Ct. Cl. 146, 150, 546 F.2d 373, 376 (1976), where reformation was allowed to correct clerical misdescriptions of property in a contract. Plaintiffs do not offer any correct OHWM determinations. More importantly, there is no mutual mistake of fact on which the court could predicate any such action in any event. Defendant and the Corps maintain that the OHWM determinations in issue are correct. There is no reliable evidence in this record that the Corps' OHWM determinations are incorrect. It must be concluded that there was no mistake by the government and thus no mutual mistake and, accordingly, no basis for reformation. *See Fraass Surgical Mfg. Co.* v. *United States*, 215 Ct. Cl. 820, 825-29, 571 F.2d 34 (1978).

[29] In *Vanada*, a trial judge of this court did find that as to one tract of land in the Newburgh pool the Corps' OHWM determination was erroneous as to a portion of land on said tract below the Corps' OHWM determination because the evidence showed this portion of land to have been farmed, and crops harvested for profit, over the course of at least 23 years. Applying the agricultural value test, citing, *inter alia*, *Borough of Ford City* v. *United States*, 345 F.2d 645 (3d Cir. 1965), *cert. denied*, 382 U.S. 902, the trial judge concluded that this farmed portion of the tract must be deemed to be above the OHWM. Subsequent to the rendition of the trial judge's recommended decision and conclusion of law, the parties in *Vanada* settled the case. *See* 206 Ct. Cl. 819. Accordingly, there was no decision on the merits as to this OHWM issue, and the trial judge's recommended decision is not a judgment of the court under these circumstances. *See Pitcairn* v. *United States*, 212 Ct. Cl. 168, 195-96, 547 F.2d 1106, 1123-24 (1976). There is no reliable evidence in the record that the Corps' OHWM determinations on any of the properties in issue embraced lands that were farmed and/or cropped below said OHWM determinations. On this record, plaintiffs, in any event, would not meet the test utilized by the trial judge in his *Vanada* recommended opinion.

in note 29, *supra*, has no precedential value, and even if it did, plaintiffs would not, on this record, fall within the pale of its holding. No case has been cited, and none has been found, where a court has concluded that the Corps' OHWM determinations on the entire Ohio River are patently defective.

As to that category of plaintiffs who entered into flowage easement warranty deed agreements with the Corps, it appears that the statute of limitations bars any claim those plaintiffs may have for additional compensation emanating from said easements relating to the OHWM. This same defense would seem to have equal applicability to the claims of the other two categories of plaintiffs as well. The flowage easements in issue were all acquired by the Corps on or before September 5, 1967. The earliest petition in these cases was filed on July 16, 1975, more than 6 years after the acquisition of these flowage easements. Accordingly, 28 U.S.C. § 2501, without more, bars consideration of these OHWM claims. Plaintiffs' suggestion that the statute of limitations is not applicable to fifth amendment taking claims is clearly without merit. *See Soriano* v. *United States*, 352 U.S. 270 (1957); *Nadler Foundry & Mach. Co.* v. *United States*, 143 Ct. Cl. 92, 95–96, 164 F. Supp. 249, 251–52 (1958).[30]

The OHWM determinations in issue were plainly stated in the flowage easement documents. They were not concealed from plaintiffs. Further, the OHWM on a riverbank is a physical fact, subject to determination by inspection of the riverbank. *Kelley's Creek & N.W.R.R. Co.* v. *United States*, 100 Ct. Cl. 396, 405–06 (1944). It is not unreasonable to expect

[30] Defendant does not raise the defense of limitations as to the erosion claims advanced by plaintiffs. It has been held in one case that a taking occurs when a dam was completed and put in operation by the filling of the pool. *See County Court of Marion County W. Va.* v. *United States*, 53 Ct. Cl. 120, 150 (1918); *but see United States* v. *Dickenson*, 331 U.S. 745, 747–49 (1947). In the Cannelton pool area, the pool rise was completed on August 17, 1972. The plaintiffs in this pool area claimed they began to notice erosion on their banks in 1972 or thereabouts. Since the petitions involving Cannelton pool plaintiffs were filed within 6 years of August 17, 1972, there is no question but that their erosion claims are timely. However, when the erosion claims of the Meldahl pool plaintiffs accrued are not as easily determined on this record. The Meldahl pool rise was completed on March 28, 1965. Unlike the Cannelton pool plaintiffs, some Meldahl pool plaintiffs testified generally that they did not notice any erosion manifestations until 1972 or thereabouts even though the water level had been raised some 7 years previously. One Meldahl pool plaintiff testified he first noticed erosion incidents in 1967. Because a number of Meldahl pool plaintiffs did not testify or acquire their property after the dam was operational, it is difficult to draw conclusions as to when erosion manifested itself on the banks sufficient to start the running of the limitations period. Under such circumstances, and since defendant does not raise limitations as a defense to the erosion claims, limitations will not be deemed to apply to the claims of the Meldahl pool plaintiffs although the question is a sticky one.

that plaintiffs, as riparian landowners, were familiar to some degree with their riverbanks. Given the Corps' OHWM determinations, plaintiffs had all the information necessary and available to them to contest these determinations at the time the flowage easements were obtained from them. *See Hart* v. *United States*, 585 F.2d 1280, 1283 (5th Cir. 1978). It is difficult under such circumstances to accept plaintiffs' views that they were deceived or misled by the Corps' OHWM determinations. *See Butler* v. *United States*, 213 Ct. Cl. 379, 386, 551 F.2d 286, 290 (1977). It is to be noted that other riparian landowners on the Ohio River, from whom the Corps acquired flowage easements in connection with its high-lift dam modernization program, challenged the Corps' OHWM determinations in a timely manner when they believed them to be incorrect. *See United States* v. 21.54 *Acres of Land*, *supra*, 491 F.2d at 303 (Hannibal Locks and Dam); *Vanada* v. *United States*, 202 Ct. Cl. 1121 (1973); and 206 Ct. Cl. 819 (1975) (Newburgh Locks and Dam). Plaintiffs could have, and should have, done so before the limitations period ran on them. Accordingly, since their OHWM causes of action accrued at dates more than 6 years prior to their instituting suits in this court, these claims are time barred. Plaintiffs have offered no acceptable reasons why the running of the statute of limitations should be suspended or not applied in these cases. *See Braude* v. *United States*, 218 Ct. Cl. 270, 273–74, 277–78, 585 F.2d 1049, 1051–52, 1053–54 (1978); *Japanese War Notes Claimants Ass'n.* v. *United States*, 178 Ct. Cl. 630, 634–36, 373 F.2d 356, 358–60 (1967). The passage of time, the raising of the pools and the effects of floods, etc., have undoubtedly changed the riverbanks in issue such that today one would be unable to inspect these riverbanks and determine where in 1965 or before (Meldahl pool), or 1972 and before (Cannelton pool) the OHWM was. The statute of limitations was designed to cover just such situations.

In summary, after careful consideration of the voluminous trial record in these cases and giving due regard to the proposed findings of fact and briefs of the parties, it is concluded that plaintiffs are not entitled to a favorable liability determination relative to their allegations that the Corps was guilty of fraud and misrepresentation in obtaining flowage easements on the properties in issue.

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IN THE UNITED STATES COURT OF CLAIMS

No. 80-78

SIMON ZUNAMON and CHICAGO MILL AND LUMBER COMPANY	Eminent Domain; flowage easement; determination of navigability of river; location of river bed.
v.	
THE UNITED STATES	

William D. Brown, attorney of record for plaintiffs. Brown, Wicker & Lee, of counsel.

Hubert M. Crean, with whom was Assistant Attorney General James W. Moorman, for defendant. Charlotte R. Bell, of counsel.

Before DAVIS, Judge, Presiding, NICHOLS and SMITH, Judges.

O R D E R

This case is before us on defendant's motion for summary judgment. Since we

determine that there are material fact issues requiring trial, the motion must be denied.

The individual plaintiff is the owner of 226 acres in Franklin Parish, Louisiana, called Little Hog Glade, and the company plaintiff owns the timber situated thereon. The suit is to recover for taking of a flowage easement. The Glade is situated on the north side of the Tensas River where it broadens to a lake, so called, at a point where it flows roughly east to west. The Glade was itself a former stream bed, and was before 1972 intermittently flooded from December to June, and dry the rest of the year. It grew trees harvested at intervals of time by the company and was the resort of cattle and hogs for grazing in the dry season only. Defendant in 1972 completed a lock and dam at Jonesville, downstream, and since then flooding has been more

extensive, and throughout the year, causing the trees to die and making the land unavailable for cattle.

Defendant's motion is supported by official maps, records, and affidavits of officials, and also one by a botany expert. Its syllogism is composed of the following elements: (1) the Tensas River is navigable, (2) the ordinary high water mark(OHWM) at plaintiffs' premises is 43 feet above mean sea level (msl), (3) the Jonesville lock and dam creates a pool only 34 feet above msl, and has no influence on water levels at Little Hog Glade above 37 feet, (4) since the navigation servitude extends to OHWM on both sides, 43 feet, the Jonesville lock and dam causes no flooding that is compensable. Q.E.D.

Plaintiffs say the navigability of the Tensas River is in issue and must be proved, but they do not expressly deny

the fact. Defendant relies on its own official maps showing the river as navigable to a point upstream of the involved land, official reports calling the stream navigable, and on records. We are inclined to believe this is sufficient, in light of Rule 201 of the Federal Rules of Evidence, allowing us to accept as true what is generally known and capable of accurate verification if notice is given, as defendant did in its brief. If plaintiffs in their opposition had included any evidence the river was nonnavigable, a different case would be presented. As it is, they appear to want to put defendant to needless proof of a fact they do not deny.

As to the position of the OHWM, we believe we can make no finding on summary judgment. Plaintiffs say this is the other fact issue. The parties talk past one another. Defendant relies on the opinion of its botanist, who made his survey in 1978,

and he relied on a clear demarcation between hydric (aquatic) and terrestrial (upland) plants in the Glade which he then observed. Plaintiffs rely on affidavits showing how much the flooding has worsened since 1972, and how it has killed or damaged the trees. Defendant points out that it can concede the truth of these affidavits, since any increase of flooding is not compensable so long as it is on a navigable stream and all below OHWM.

Defendant's entire case, however, depends on the accuracy of its identification of the OHWM. We do not think that so vital a point can be treated as not a triable issue, where the conclusion rests on expert opinion testimony, even if the latter is not directly controverted. On trial, plaintiffs would not have to rebut this evidence with an expert of their own. They could cross-examine the opposing expert and possibly

show his opinion was not based on facts. Correspondingly, it does not appear a court can conclude, in such a case as this, that no triable fact issue exists, simply because no rebuttal opinion testimony is offered. Another difficulty is that the expert saw the property in 1978, six years after the lock and dam commenced to operate. It would seem, to the extent the line of plant demarcation establishes the OHWM it would be that line that existed when the river was in its natural state, a condition that ended in 1972. That the line was moved upwards is strongly suggested by defendant's own concession that, before its expert's survey, it had determined that OHWM was at 41.5 feet above msl.

Moreover, the natural condition of the property, before 1972, as plaintiffs' affidavits describe it, was strikingly similar to the property involved in Goose

Creek Hunting Club, Inc. v. United States, 207 Ct. Cl. 323, 518 F 2d 579 (1975). There was the same suitablity for cattle grazing, in the dry season, and the same growths of bitter pecan, willow, and overcup oak trees. The Good Creek Hunting Club property is in the same part of the world as the property here involved, and was flooded by the same Jonesville lock and dam project. We held that property was not in the bed of any stream whether navigable or other, from which it might follow that Little Hog Glade was not there either.

While the bed of a navigable stream normally extends from side to side of the stream at OHWM, there are peculiarities in the configuration of the Glade that might suggest a different reading there. Specifically, defendant's detail map shows a peninsula or cape, elevation 50 feet, and all above OHWM as demarked by defendant, that interposes between most of the Glade

and the main channel or bed of the Tensas River. Sloughs, creeks, etc., that connect with navigable streams are not thereby made navigable themselves if not themselves used as highways of commerce, and the navigation servitude does not help defendant if it backs water up into them. Goose Creek; supra; Wisconsin Bridge Co.v. United States, 114 Ct. Cl. 464, 84 F. Supp. 852 (1949), cert. denied, 339 U.S. 982 (1950). If the property is not in the Tensas stream bed, its elevation relative to OHWM would apparently not be conclusive. The Goose Creek opinion, moreover, suggests several ways of determining the location of OHWM that may, if used here, possibly lead to different results than the plant demarcation method used by defendant's expert herein.

We make no finding ourselves. We merely hold that there is a triable issue of fact as to whether the Glade is or was

in the bed of the navigable Tensas River, and as to the 1972 elevation of OHWM. We strongly suggest that a view by the trier of the locus, even in its present altered state, might be more enlightening than many thousand pages of testimony.

Upon the motion and response, the briefs of the parties, the affidavits, maps, and documents submitted by them, but without oral argument, the defendant's motion for summary judgment is denied, and the cause is remanded to the trial division for further proceedings.

BY THE COURT

July 27, 1979

OSCAR H. DAVIS
Judge, Presiding

Opposition

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No. 81-700

In the Supreme Court of the United States

OCTOBER TERM, 1981

EARL LOESCH AND HENRIELLA BYNON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Claims violated Article III of the Constitution when the three-judge panel adopted the trial judge's recommended findings and opinion on petitioners' erosion damage claims after considering briefs and oral argument presenting petitioners' exceptions to the recommended findings and opinion.

2. Whether petitioners were denied due process by the panel's adoption of the trial judge's recommended findings and opinion under those circumstances, by the trial judge's failure to include certain additional findings in his report, by the panel's denial of petitioners' motion to reopen the record and remand the case to the trial judge for additional evidence, and by the panel's failure to make a tape recording of the oral argument available to petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims, incorporating the opinion of the trial judge, is reported at 645 F. 2d 905 (Pet. App. C).

JURISDICTION

The judgment of the Court of Claims was entered on March 11, 1981. A petition for rehearing en banc was denied on May 15, 1981. On August 6, 1981, the Chief Justice extended the time for filing a petition for a writ of certiorari until October 12, 1981. The petition was filed on October 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATEMENT

Petitioners are owners of land adjacent to the Ohio River or its tributaries (Pet. App. C2). Since 1824, the federal government has constructed locks and dams along the Ohio River for the purpose of improving navigation on the river.

In 1954, in response to increased river traffic, the government began a program to construct 19 high-lift locks and dams to replace the existing low-lift dams (*id.* at C4-C5).

Between 1961 and 1967, the Army Corps of Engineers obtained flowage easements by purchase or condemnation from petitioners or their predecessors in title in order to accommodate the expected rise in water level in the pools formed behind two of the three high-lift dams concerned in this case (Pet. App. C6-C7). Those easements gave the United States "the perpetual right to permanently and/or occasionally overflow, flood and submerge [specified] riparian fast lands, *i.e.* lands [at stated elevations] above the ordinary high water mark (OHWM)" (*id.* at C6 n.6).[1]

During a two-year period beginning in July 1975, petitioners, assembled in six separate groups, filed suits in the Court of Claims alleging that the federal government's operation of the high-lift locks and dams on the Ohio River had produced flooding of petitioners' lands beyond that contemplated by the flowage easements and had produced erosion damage to their lands as a result (Pet. 11-13; Pet. App. C2). In addition, they alleged that the Corps of Engineers had obtained the flowage easements through fraud, and, in particular, through misrepresentation with respect to the location of the OHWM. They sought damages as just compensation for the alleged taking of their property (*id.* at C2-C3).

The six cases were consolidated, and evidence was taken before a trial judge during a four-week hearing ending February 3, 1978 (Pet. 14; Pet. App. A6). On October 31, 1979, the trial judge issued extensive findings of fact and a

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[1]Because the federal government's navigational servitude extends to the OHWM, the government is obligated to acquire flowage easements only for lands above that point. *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 627-628 (1961).

recommended opinion, concluding that the high-lift dams operated on the Ohio River and the attendant rise in river pool levels were not responsible for the erosion damage to petitioners' lands (Pet. App. C; Pet. 14). He based this conclusion on his subsidiary finding that the erosion was the result of flooding and that the high-lift dams were navigation dams operated in a manner that did not affect the river during periods of high flow (Pet. App. C7-C8, C10-C13). He also found, as to each petitioner who made such charges, that the Corps of Engineers had not acquired flowage easements through fraud and misrepresentation (*id.* at C19-C23).

Petitioners filed exceptions to the trial judge's recommended findings and opinion, submitted briefs, and argued their objections before a three-judge panel of the Court of Claims (Pet. App. C2; Pet. 14-15). On March 11, 1981, approximately two months after the oral argument, the panel issued its decision, which adopted the recommended findings and opinion of the trial judge, and concluded that petitioners were not entitled to recover on their claims. The panel accordingly dismissed the petitions (*ibid.*). On the same date, the Court of Claims issued an order denying petitioners' motion to reopen the record and remand the cases to the trial judge for additional findings (Pet. 18-19).

ARGUMENT

The procedures followed by the Court of Claims in the trial and final decision in this case were in accord with all applicable statutory and constitutional requirements. The issues presented by petitioners involve no conflict between the decision below and decisions of this Court or of other federal courts. The case, accordingly, does not warrant review by this Court.

1. Petitioners contend that the procedures followed by the Court of Claims in the consideration of their exceptions

to the trial judge's findings violate Article III of the Constitution, as construed in *United States* v. *Raddatz*, 447 U.S. 667 (1980). The contention is without merit.

Congress is not constitutionally compelled to provide for hearings on claims against the United States by judges with life tenure as specified in Article III of the Constitution (*Williams* v. *United States*, 289 U.S. 553 (1933); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 573 (1962) (opinion of, Harlan, J.)). Congress has, nonetheless, established the Court of Claims as an Article III court (28 U.S.C. 171). In *United States* v. *Raddatz, supra*, a case involving a provision of the Federal Magistrates Act, 28 U.S.C. 636(b)(1), this Court held that the delegation to United States magistrates of the function of making proposed findings of fact and recommended decisions on pretrial motions in criminal cases did not violate Article III "so long as the ultimate decision is made by the district court," *i.e.*, an Article III judge. 447 U.S. at 683.

While Rule 8 of the Court of Claims provides that the Article III judges "shall function primarily in an appellate capacity" and Rule 147(b) provides that the findings of fact of the trial judges are "presumed to be correct," it remains true that, under the latter rule, the Court of Claims' Article III judges remain free at all times to modify or completely reject a trial judge's findings. The final decision in each case is the panel's decision, whether it adopts, modifies, or rejects a trial judge's findings. It is undisputed that a three-judge panel of the Court of Claims received briefs and oral argument on petitioners' exceptions to the trial judge's recommended findings and opinion and rendered a final decision dismissing their petitions. Thus, even assuming that petitioners are constitutionally entitled to a final decision on their claims by an Article III judge or judges, they have received that to which Article III entitles them.

2. Petitioners also contend that the hearing procedures violated both their Fifth Amendment right to due process

and their rights under 28 U.S.C. 2503(b), a provision which requires that the rules of the Court of Claims "provide for the filing in court of the commissioner's [trial judge's] report of facts and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the court within a reasonable time."[2] Neither claim has merit.

a. In *United States* v. *Raddatz, supra*, this Court rejected a contention, based on the proposition that " '[t]he one who decides must hear' " (447 U.S. at 677, quoting *Morgan* v. *United States*, 298 U.S. 468, 481 (1936)), that due process requires the rehearing of testimony by the final decisionmaker whenever the credibility of witnesses was an issue before the tribunal making the initial findings and recommendations. The Court concluded that so long as the applicable procedure gave broad discretion to the final decisionmaker to accept, modify, or reject the initial findings and to hear live testimony by the witnesses where necessary, there was no denial of due process. 447 U.S. at 680-681. The Court suggested that there might be a "serious question[]" if a district judge were to *reject* a dispositive credibility finding of a magistrate without rehearing the testimony, but it had no need to decide that question in the case before it. *Id.* at 681 n.7.

Petitioners' attempt to rely on *Raddatz* for their contention (Pet. 14-15, 18-22, 29-31) that the hearing they received before the Court of Claims panel was constitutionally defective because the panel *accepted* all the findings of the trial judge without remanding for new factual findings that petitioners contend would give a more accurate picture of

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[2]In addition, petitioners rely (Pet. 32, 35) on 28 U.S.C. 636(b)(1)(C), but that provision applies only to hearings by United States magistrates on matters referred to them by United States District Court judges. It has no application to the Court of Claims.

the trial record and without ordering the reopening of the record to receive documentary evidence that, according to petitioners, would "totally destro[y] the credibility of [the government's] witnesses" (*id.* at 21). Nothing in *Raddatz* supports their claim. Petitioners were entitled to bring to the panel's attention any portion of the record they deemed inconsistent with the trial judge's opinion, but the panel was not required to conclude that those portions indicated critical omissions in the trial judge's findings or opinion. Neither was it obligated to agree with petitioners (see Pet. 17-18, 21) that additional documentary evidence cited to the panel, a 1935 congressional report and an environmental impact statement concerning certain dams, was damaging to the credibility of witnesses whom the trial judge had credited. Petitioners' complaint, at bottom, is that the panel found insufficient merit in their lengthy exceptions to warrant a written opinion addressing them. The failure to write such an opinion does not amount to a denial of due process.

b. Nor were petitioners denied any rights guaranteed by 28 U.S.C. 2503(b). On its face that provision guarantees only an opportunity to file exceptions to the trial judge's "report of facts and recommendations for conclusions of law" and a hearing on those exceptions. The provision does not guarantee, as petitioners suggest, findings by the trial judge that include every fact that a party believes essential to the issues or a written opinion from the Court of Claims panel expressly addressing exceptions filed by a party. Again, petitioners' complaint is essentially that the trial judge and the Court of Claims panel did not accept petitioners' view of the evidence.[3]

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[3]For example, petitioners' contention (Pet. 22-24) that the trial judge made no findings or conclusions as to whether the Corps of Engineers promulgated a line for the OHWM that "does not denote the true navigable servitude," omitted statutorily required surveys, prepared

Finally, it is not clear on what basis petitioners claim a right to be provided with tape recordings of the oral argument before the Court of Claims panel (see Pet. 1, 15-16). They cite no statutory or constitutional provision that guarantees such a right and we are aware of none.[4]

"inaccurate maps" and presented testimony of "deliberately uninformed employees" chiefly reflects petitioners' disagreement with the trial judge's finding, based on credited testimonial and documentary evidence, that "the Corps has, in fact, accurately described the various lands in which it intended to, and did, take flowage easements" (Pet. App. C24) and his rejection of petitioners' argument that the OHWM determinations were defective (*id.* at C24-C26, Trial Judge's Findings of Fact Nos. 61-66, at 176-187).

[4]In a petition for a writ of mandamus to the Court of Claims now pending in this Court, *In re Avabelle Baskett*, No. 81-595 (filed Sept. 24, 1981), parties to consolidated cases in the Court of Claims involving damage claims similar to those that were brought by petitioners here are seeking mandamus from this Court to compel the Court of Claims to require its trial judges to report factual findings in a manner that permits the findings to be "weighed" by Article III judges. The petition states, as one basis for its mandamus request, that "[i]n the combined causes of *Earl Loesch and Henriella Bynon, et al.* v. *The United States* * * * [Trial Judge] Thomas J. Lydon undertook to function as an Article III Judge rendering his decision based upon selected Findings of Fact to support that decision" (Baskett Pet. 10). The Court of Claims has informed this Court, by letter dated Oct. 26, 1981, that it plans to file no response to the *Baskett* petition.

We note that the significance of any challenge to the current procedures of the Court of Claims is substantially reduced by the existence of legislation pending in Congress that would create a United States Court of Appeals for the Federal Circuit and a United States Claims Court that, together, would include the jurisdiction of the present Court of Claims. S. 1700, 97th Cong., 1st Sess. (1981); H.R. 4482, 97th Cong., 1st Sess. (1981); H.R. Rep. No. 97-321, 97th Cong., 1st Sess. (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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NOVEMBER 1981

DOJ-1981-11

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
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CLERK

No. 81-700

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

October 1981 Term

EARL LOESCH AND HENRIELLA BYNON

GEORGE R. WAGNER, et al.

NICHOLAS AND MARGARET PURCELL

JOHN H. McGEHEE, et al.

JAMES CHOUINARD, et al.

LETHA M. TOLLIVER, Administratrix of
Estate of Alfred Tolliver, deceased, et al.,

Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

REPLY-BRIEF OF PETITIONERS

Charles S. Gleason, Attorney
of Record for Petitioners,

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QUESTIONS PRESENTED

1. Whether after reopening of evidence the Court of Claims is then bound to consider in addition to briefs and oral argument the record to make a de novo determination of the effect, if any, that the newly admitted or judicially noticed evidence has upon the prior credibility determinations of the trial judge (magistrate-commissioner).

2. Whether there was ever any evaluation of the 1935 Congressional Report, and the environment impact statement, as they relate to prior evidence, especially credibility of witnesses.

3. Whether the Confession of Error by the Respondent now justifies a review of the entire record.

4. Whether proposed Legislation allegedly to correct the known Due Process deficiencies of the Court of Claims procedures and practices justifies abstention by The Supreme Court from adjudicating the existing controversy.

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STATEMENT

Respondent has confessed error in that:

(a) the additional documentary evidence, a 1935 Congressional Report and an enviornmental impact statement were cited to the panel (see Resp. p. 6);

(b) no record was made of the panel proceedings (see Resp. p. 7);

(c) the panel did not review the entire record (see Resp. p. 5);

(d) no Finding was made respecting the effect, if any, that the newly admitted evidence had upon the prior Findings(see Resp. p. 7);

(e) Court of Claims practice and procedure is recognized by Respondent and Congress as being less than Due Process(see Resp. p. 7 note 4).

(f) the Court of Claims recognizes its practice and procedure fails to afford constitutional due process: Appendix C

(g) the Court of Claims can by General Order amend its Practice and

Procedure to conform to Constitutional Standards. Appendix A & B.

ARGUMENT

It is undisputed that the Article III Judges reopened the Proof and admitted new evidence. Thus they modified the trial proceedings. The Panel was precluded from summarily finding that the trial judge's Findings would not have been affected. That determination could only be made by the Panel upon a review of the entire record.

United States v. Raddatz, 447 U. S. 667 (1980) turned upon the fact that *Raddatz* still had the opportunity to present his entire case at his forthcoming trial including the issue previously ruled upon. Thus *Raddatz* was held not yet denied Due Process.

Loesch was never given the opportunity to present all of his evidence to the final decisionmaker or to the initial decisionmaker, and never will except upon granting of Certiorari.

In Justice Brandeis's words:

> "The supremacy of law demands that there shall be an opportunity to have some court decide x x x whether the proceeding in which the facts were adjudicated was conducted regularly" Concurring in *St. Joseph Stock Yards Co. v. United States* 298 U. S. 38, 84 (1936).

No court has reviewed the entire record in this cause.

It is one thing to say that "it is for Congress to determine how the rights which it creates shall be enforced", such as Administrative proceedings. See *Switchman's Union v. National Mediation Board*, 320 U.S. 297 (1943).

On the other hand, Congress has no authority to deny Due Process in defining or in failing to define the remedies for preexisting rights, such as Fifth Amendment Constitutional Rights.

> "If the judiciary has no power in such matter, the only practical restraint would be the self-restraint of the executive branch.

> Such a result is foreign to the concept of the division of the powers of government" *Fleming v. Moberly Milk Products Co.* 160 F 2d 259,265, (D.C. Cir. 1947) cert. dismissed 331 U.S. 786 (1947)

The Court of Claims chose not to file a response *In Re Avabelle Baskett*, No. 81-595 (filed September 24, 1981) but it did by GENERAL ORDER NO 1 of 1981, effective October 1, 1981 rewrite Court of Claims Rule 14 (d)(of 1969) to conform to Due Process. (See and compare Appendix A and B). Such relief can be achieved by the Court on its own.

Additional unconstitutionality of The Court of Claims practice and procedure as respects Fifth Amendment Taking Cases, Trials, De Novo Hearings and Appeals, was recognized by the Judicial Conference of 1979. (See Appendix C).

In 1979 corrective legislation was proposed, [S. 677, S.678 and H.R. 3806].

(See Appendix C).

In *Brown Transport Corp, v. Atcon Inc.* 439 U.S.1014 (1978) Justice White joined by Justice Blackmun, noted that plenary consideration had been denied in many review worthy cases in recent years and commented:

> "There is no doubt that those concerned with the coherence of the federal law must carefully consider the various alternatives available to assure that the appellate system has the capacity to function in the manner contemplated by the Constitution. As [the Freund Committee and the Hruska Commission] have already noted, there is grave doubt that this function is being adequately performed."

In a separate opinion in *Brown*, Chief Justice Burger praised Justice White's statement as "sound" and "an important service". He recalled that he as well as Justices White, Blackmun, Powell and Rehnquist had submitted letters to the Hruska Commission generally agreeing " on the need for some relief if this Court is to achieve and main-

tain the optimum level of quality in its work".

Counsel humbly submits that an occasional review of an entire record before the Court (this record is on file at the Clerk's Office) would go a long way toward putting lower courts on their guard and the number of those feeling the need for Supreme Court review would be substantially reduced. This is especially true in the Court of Claims where the Justice Department has not only molded the Rules but has perfected expertise in their use and abuse to the detriment of most unsuspecting counsel.

The Respondent's cite to the legislation which is now pending is little solice to *Loesch*.

CONCLUSION

That corrective legislation has been pending for more than two (2) years should

point out the even greater significance of the need for the U. S. Supreme Court's power of supervision under Title 28 U.S.C. 1651 (a) and S.Ct. Rule 17. This present substantial controversy is only for one of several groupings of litigants who must seek redress or be time barred. Their relief can not await legislation which may be no more constutitionally applied than the present statutes and Rules of Court.

The Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

Charles S. Gleason

Charles S. Gleason

RULE 14. REFERENCE OF CASES TO TRIAL JUDGES

(d) **Disqualification:** A trial judge may at any time withdraw from a case if he deems himself disqualified. Upon the filing in good faith by any party of a timely and sufficient affidavit of personal bias or disqualification of a trial judge, the chief of the trial division shall determine the matter, subject to review by the court in its discretion.

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

GENERAL ORDER NO. 1 of 1981

IT IS ORDERED, effective this date, that the Rules of the United States Court of Claims, as revised on September 1,1969, and subsequently amended, shall be, and they are hereby, further amended in the following respects:

1. Rule 14 (d) is amended to read as follows:

(d) Disqualification: (1) Standards: The trial judges of this court are subject to the standards for disqualification set by 28 U.S.C. § 455.

(2) Voluntary Disqualification: A trial judge may at any time withdraw from a case if he deems himself disqualified.

(3) Affidavit of Bias or Prejudice: (i) Whenever a party to any proceeding makes and files an affidavit that the trial judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party such trial judge, if he determines that the affidavit is sufficient and timely, shall proceed no further therein, but the chief of the trial division shall assign another trial judge to hear such proceeding. The ruling of the trial judge shall be by order.

(ii) The affidavit shall state the

facts and the reasons for the belief that bias or prejudice exists, and shall be filed as soon as practicable after the facts upon which the affidavit is based become known to the party, but not less than 10 days before a scheduled trial date, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

X X X X X

APPENDIX B

PROCEDURES FOR PROCESSING COMPLAINTS OF JUDICIAL MISCONDUCT PURSUANT TO SECITON 372 (c) OF TITLE 28, UNITED STATES CODE

1. Any person alleging that a judge, or trial judge of this court, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the court, or alleging that such a judge or trial judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of this court a written complaint containing a brief statement of the facts constituting such conduct.

2. Upon receipt of a complaint filed under paragraph 1, the clerk shall promptly transmit such complaint to the chief judge of this court, or, if the conduct complained of is that of the chief judge, to that judge in regular active service next senior in date of commission (hereafter, for purposes of these procedures only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or trial judge whose conduct is the subject of the complaint.

3. (a) After expeditiously reviewing a

complaint, the chief judge by written order stating his reasons, may--

(1) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph 1, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(2) conclude the proceeding if he finds that appropriate corrective action has been taken.

(b) The chief judge shall transmit copies of his written order to the complainant and to the judge or trial judge whose conduct is the subject of the complaint.

4. If the chief judge does not enter an order under paragraph 3, such judge shall promptly--

(a) appoint himself and two judges of this court to a special committee to investigate the facts and allegations contained in the complaint;

(b) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(c) provide written notice to the complainant and the judge whose conduct is the subject of the complaint of the action taken under this paragraph.

5. Each committee appointed under paragraph 4 shall conduct an investigation as extensive as it considers necessary, thereon with the chief judge for the court. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate

action by the court.

6. Upon receipt of a report filed under paragraph 5, the court --

(a) may conduct any additional investigation which it considers to be necessary;

(b) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the court, including, but not limited to, any of the following actions:

(1) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of section 372 of title 28, United States Code;

(2) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of title 28, United States Code shall not apply;

(3) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge, or trial judge, whose conduct is the subject of a complaint;

(4) censuring or reprimanding such judge, or trial judge, by means of private communication;

(5) censuring or reprimanding such judge, or trial judge, by means of public announcement; or

(6) ordering such other action as it considers appropriate under the curcumstances, except that in no circumstances may

the court order removal from office of any judge appointed to hold office during good behavior; and

(c) shall immediately provide written notice to the complainant and to such judge, or trial judge, of the action taken under this paragraph.

7.(a) In addition to the authority granted under paragraph 6, the court may, in its discretion, refer any complaint involving a judge of the court, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(b) In any case in which the court determines, on the basis of a complaint and an investigation, or on the basis of information otherwise available to the court, that a judge appointed to hold office during good behavior has engaged in conduct--

(1) which might constitute one or more grounds for impeachment under article I of the Constitution; or

(2) which, in the interest of justice, is not amenable to resolution by the court;

the court shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(c) The court acting under authority of this paragraph shall, unless contrary to the interests of justice , immediately submit written notice to the complainant and to the judge whose conduct is the subject

of the action taken under this paragraph.

8. In conducting any investigation under this paragraph, the court,or a special committee appointed under paragraph 4, shall have full subpoena powers as provided in section 332(d) of title 28, United States Code.

9. A complainant, judge, or trial judge aggrieved by a final order of the chief judge under paragraph 3 may petition the court for review thereof. A complainant against the judge, or the judge aggrieved by an action of the court under paragraph 6 may petition the Judicial Conference of the United States for review thereof.

10.(a) Adequate prior notice of any investigation will be given in writing to the judge or trial judge whose conduct is the the subject of the complaint.

(b) The judge or trial judge whose conduct is the subject of the complaint will be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the committee or court, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present agrument orally or in writing.

(c) These procedures are a matter of public record, and any such rule promulgated by the court may be modified by the Judicial Conference.

11. No judge whose conduct is the subject of an investigation shall serve upon a special committee appointed under paragraph 4, as a member of the court

pursuant to paragraph 5, upon the Judicial Conference, or upon the standing committee established under section 331 of title 28, United States Code, until all related proceedings under this paragraph have been finally terminated.

12. No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before the court.

13. All papers, documents, and records or proceedings related to investigations shall be confidential and shall not be disclosed by any person in any proceeding unless--

(a) the court, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(b) authorized in writing by the judge or trial judge who is the subject of the complaint and by the chief judge of this court, the Chief Justice, or the chairman of the standing committee established under section 331 of title 28, United States Code.

14. Each written order to implement any action under paragraph 6(b), which is issued by the court, the Judicial Conference, or the standing committee established under section 331 of title 28, United States Code, shall be made available to the public through the clerk of this court. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

Proceedings of the
1979
Court of Claims Judicial Conference

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and

Manual for Practice in the Court of Claims
Court of Claims Rules, Revised
and Amended through November 29, 1979

MAY 17, 1979
THE CAPITAL HILTON HOTEL
WASHINGTON, D.C.

MATTHEW
BENDER

235 E. 45th STREET, NEW YORK, N.Y. 10017

APPENDIX C

Appendix C

Summary of the Proposed United States Court of Appeals for the Federal Circuit and United States Claims Court

Status: On February 27, 1979, President Carter transmitted to Congress a proposal to merge the Court of Claims and the Court of Customs and Patent Appeals into a new Article III court to be known as the "United States Court of Appeals for the Federal Circuit." The new court would consist of twelve Article III judgeships (initially staffed by the judges of the existing courts) and would be on line with the existing circuit courts of appeals. A new U. S. Claims Court would also be established as an Article I trial court (initially staffed by the present Court of Claims Commissioners). Hearings in the Senate Judiciary Committee have now begun. (S. 677)

Object: (1) To create an appellate forum capable of being assigned nationwide appellate jurisdiction in selected categories of cases; (2) to simplify and achieve efficiency in the administration of the federal judiciary; (3) to reduce the widespread lack of uniformity and uncertainty of legal doctrine that now exists in the administration of the patent law.

Patent Jurisdiction: The new court would have exclusive appellate jurisdiction over all patent cases in the district courts (under 28 U.S.C. § 1338) as well as over all appeals in patent cases currently reviewed by the CCPA.

Other Jurisdiction: The new appellate court would inherit all other jurisdiction of the two existing courts except for (1) cases brought under the Federal Torts Claims Act and (2) the trial function now being performed by the Commissioners of the Court of Claims.

Caseload: Based on recent statistics, the new appellate court would likely have a caseload of approximately 900 appeals annually.

Nonspecialization: The issues to be decided by the new appellate

court would be mixed and diverse. In addition to patent appeals, the court would hear some civil tax and agency appeals, trademark issues, and appeals in suits against the government for damages or breach of contract.

Trial Function: The proposed U. S. Claims Court would inherit all of the present trial jurisdiction of the Court of Claims (again, except for Tort Claims Act cases). Appeals from this new trial court would go to the U. S. Court of Appeals for the Federal Circuit.

Headquarters: The new courts would be based in Washington, D. C., but would be expected to sit at other designated places around the country.

Panels: The new appellate court could sit in panels of three or more judges or as an en banc court. Panel assignments would be made for two-year periods with at least one member of a panel, but no more than half, to be reassigned every two years.
(May, 1979)

PROS AND CONS: SOME VIEWS OF THE PRIVATE BAR

Remarks of Angelo A. Iadarola

Restructuring Legislation for the United States Court of Claims?—The Jury Is In: The Court Needs Reform

JUDGE SMITH: You have heard Dean Meador, as a representative of the executive branch of government, describe to you the expectations, the progress and the improvement in the administration of justice that is expected from the legislation which his office has proposed and which, together with similar legislation, has been described for you by a distinguished member of the legislative branch at lunch today.

We now turn to the private sector. We have put together a panel of private practitioners, whose areas of practice in the aggregate cover, I believe, all of the major areas presently within the jurisdiction of the Court of Claims.

We have not told them what to say and except for a brief description of the areas they plan to cover, so that we will know that all areas are covered, we don't know what they're going to say. However, we are sure that what they have to say will be of immense importance to you and to the people who are shaping this legislation.

Our first speaker is Angelo A. Iadarola. Mr. Iadarola is a partner in the Washington, D.C. law firm of Wilkinson, Cragun and Barker. After graduating from the University of Connecticut in 1955, he attended Georgetown University Law Center, from which he received his JD Degree and an LLM in taxation. Mr. Iadarola's practice has included extensive representation of private litigants before the United States Court of Claims, primarily in the areas of eminent domain, Indian claims and taxation.

Mr. Iadarola has been active throughout his professional career in various Bar organizations, including the Court of Claims Committee of the Bar Association of the District of Columbia. During

1975 through 1976, he served as Chairman of the Court of Claims Judicial Conference Subcommittee. He received the Bar Association's Chairman of the Year Award for his efforts as Chairman of the Court of Claims Committee during 1977 and 1978.

Mr. Iadarola has authored numerous legal articles in a variety of journals and has been a guest lecturer at various law schools and professional seminars. Angelo.

MR. IADAROLA:

I. Introduction—The Existing Structure of the Court of Claims Needs To Be Changed

I welcome the opportunity to appear before the United States Court of Claims Judicial Conference to present my views concerning pending legislation [S. 677, S. 678 and H.R. 3806] affecting the Court of Claims. As Judge Smith mentioned in his introduction of me, my views will be from the perspective of an attorney representing private litigants at the United States Court of Claims during the past nineteen years, primarily in the areas of eminent domain, Indian claims and tax.

My interest in the subject of court restructuring has been nourished to a great extent by my participation in the Court of Claims Committee of the Bar Association of the District of Columbia and its efforts to analyze this problem. This long-term project of our Bar Association resulted in a proposal last year for separation of the trial and appellate functions of the Court of Claims, a feature I am happy to see in all bills currently before Congress.

At the outset, I should state that for me the most important aspect in considering the pending legislation is the fact that this Court *needs* to be restructured. The current structure of the Court of Claims is unusual and simply does not make sense. It carries with it certain distinct disadvantages which a separation of the trial and appellate functions of the Court would remedy. These disadvantages, which affect both plaintiff and defendant alike, include the following:

1. The traditional arms-length relationship between the trier of

fact and appellate judge cannot be achieved where members of the Trial Division are appointed and serve at the pleasure of the Article III judges of the Court.

2. The current status of the Trial Judges does not give them the appropriate prestige they deserve and which is required if the Court is to attract competent candidates nationwide to fill these positions.

3. The current system creates unnecessary work and delays:

(a) The trial judges' findings of fact and opinions under the current system are longer and more detailed than is necessary because they are merely recommendations to the Article III judges who bear the responsibility of rendering a final judgment in each claim. This smorgasbord effect creates more work and delays for the trial judges, the Article III judges and the litigants.

(b) In the Court of Claims all cases are technically appealed because the trial judges only make recommendations to the Court and only the Article III judges can render a final judgment. This is an inefficient use of the judicial resources of the Court and creates undue delay for litigants desiring prompt action by the Court. Compare this situation with that existing with the district courts in which the appeal rate is *much* less than 50 percent.

(c) The settlement rate in the Court of Claims is low compared to other federal courts because the trial judges lack authority to enter final judgments. This lack of authority affects both the trial judges' ability to render needed impetus to settlement negotiations and the ability of counsel to formulate settlement alternatives. Instead of formulating settlement options based solely on the experience and perceptions of the trial judge, litigants are also forced to consider what the Article III judges might do to any recommended opinion and findings of fact by the trial judge involved. Because of the inherent complexities of such considerations, adequate counseling to clients (whether plaintiff or defendant) is made almost impossible. As a result, lengthy trials are conducted needlessly and cases are fully litigated (even through the appellate process) which otherwise could be settled.

(d) Dispositive motions now generally are heard by the Article III judges, a situation which suspends the proceedings before the trial judge. If the trial judge had power to enter final judgments, he/she would entertain the dispositive motions and therefore stay informed about the case. Furthermore, by removing the trial judge from the dispositive motion process, litigants lose whatever knowledge and understanding has been gained by the trial judge during pretrial conferences and procedural decision making, regarding the legal and factual positions of the parties involved. Of equal importance is the fact that the litigant is accorded an appeal if the trial judge could render a final judgment and rule on the dispositive motion, which is not the case now except by petition for *certiorari* to the United States Supreme Court.

For these reasons and others, it is clear that the Court of Claims definitely needs to be restructured. As Chief Judge Friedman recently stated in his Congressional testimony, even if Congress decides not to combine the Court of Claims and the Court of Customs and Patent Appeals into one appellate court, it should convert the Trial Division of the Court of Claims into a separate trial court.

II. The General Concept of S. 677 (and H.R. 3806) Is Preferable to That Contained in S. 678, Since Both The United States Claims Court and the Court of Appeals for the Federal Circuit Should Retain Jurisdiction Over Tax Cases

I applaud the current efforts to restructure the Court of Claims and to take care of other judicial problems in the current legislation. The Administration's proposal authored by Dean Meador and his staff is imaginative and for the most part, well-reasoned. Of the bills pending before Congress, I favor S. 677 (as it is modified by H.R. 3806). The proposal in S. 678 stripping the proposed Court of Appeals for the Federal Circuit of all jurisdiction over tax refund litigation would create more problems than it would cure.

While I have no problem with the stated objective of the proposal--to create a single appellate forum which would decide

all appeals in civil tax cases—I believe the provisions of S. 678 are unworkable and not in the best interests of proper judicial reorganization. In my opinion, if the decision is made to establish a court to hear all tax appeals, that court should be the new Court of Appeals for the Federal Circuit. This court would have a wide range of jurisdiction, would have the security of a permanent court and would not have many of the problems associated with the proposed Court of Tax Appeals. According to Dean Meador's statement before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on May 7, 1979:

> "One of the arguments made against including tax appeals in the proposed U.S. Court of Appeals for the Federal Circuit is based on the premise that the individuals who at this moment are judges of the Court of Claims and the CCPA are not the ideal persons to serve as judges in the future on tax appeals. That argument, however, lacks real substance and, indeed, is irrelevant to the institutional question whether a new U.S. Court of Appeals for the Federal Circuit is the appropriate forum for civil tax appeals."

I agree wholeheartedly with Dean Meador's statement in this regard and would challenge those who believe otherwise to bring this matter out in public so that it can be discussed fully.

It should be remembered that the Court of Claims has been exercising jurisdiction over tax refund litigation for more than sixty years, ever since it was determined by the Supreme Court that tax refund suits were covered under the Tucker Act (*United States v. Emory*, 237 U.S. 23 (1915)). Indeed, currently, the major portion of the Court's docket is made up of tax cases. Of the 1,731 cases pending at the Court on September 30, 1978, 664 (or 38.4 percent) were tax cases. If these cases were withheld from the new Court of Appeals for the Federal Circuit and/or the United States Claims Court, it is seriously questioned whether the new courts would have sufficient work for their proposed number of judges.

Even if Congress should decide that a separate Court of Tax Appeals should be established as provided under S. 678, I submit that trial jurisdiction of tax refund cases should be available with the new United States Claims Court. Among the many reasons fa-

voring this jurisdiction are the fact that the Court of Claims has historically handled large and complex tax cases and the Court will continue to have nationwide jurisdiction to effectively and efficiently handle these claims.

III. Several Portions of S. 677 (and H.R. 3806) Relating to the Proposed United States Claims Court Should Be Changed

A. Judges of the Claims Court Should Be Article III Judges

The most important and necessary portion of the pending legislation is the creation of a separate trial court at the United States Court of Claims. I have for many years advocated and continue to advocate that in any separate trial court the judges possess Article III status rather than Article I. Such a conclusion is mandated when one looks at the Court of Claims from an historical perspective and when one considers the current practicalities involved in obtaining persons of the highest caliber to serve in the judicial system.

Looking to history, I am reminded of a comment made by Chief Justice Marshall in the debates of the Virginia State Convention in 1829-1830, when he stated:

> "I have always thought from my earliest youth till now that the greatest scourge of an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary."[1]

This is but one expression of the well-recognized principle that the judiciary, in order to effect the Purposes of the Constitution, must be an independent branch of the government, "free from the remotest influence direct or indirect of either of the other two powers."[2] It was in order to ensure this independence that the framers of the Constitution provided for a judiciary whose judges:

> "shall hold their offices during good behavior and shall at

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[1] *Quoted in O'Donogue v. United States*, 389 U.S. 516, 532 (1933).

[2] *Id.* at 530 (*quoting* law lecture of James Wilson, one of the framers of the Constitution, contained in Andrews, *The Works of James Wilson* (1896), Vol. I, at 367.

> stated times receive for their services a compensation which shall not be diminished during their continuance in office."[3]

This essential and accepted need for an independent judiciary should not be lightly ignored. Congress has chosen to express clearly its intent that the Court of Claims be clothed with the protection found in Article III of the Constitution.

It should be remembered that when the Court of Claims was established by the Act of February 24, 1855, ch. 122, 10 Stat. 612, its designated purpose was to hear claims against the United States, and report its findings and recommendations to Congress. Under this plan, Congress acted legislatively to approve or disapprove the Court's suggested dispositions of the claims. This lack of independence made a mockery of the Court of Claims and was entirely unworkable. As a result, President Lincoln proposed that the Court of Claims be restructured so as to make its decision final, stating as follows:

> "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final."

The President's proposal was adopted. Act of March 3, 1863, ch. 92, § 5, 12 Stat. 763, 766.

Following the 1863 Act, it was generally recognized that the Court of Claims was an Article III court.[4] The exception to this recognition came in 1933, when, notwithstanding prior decisions and seizing on the absence of the word "all" in the Constitutional provision providing for judicial power over controversies in which the United States was a party, the Supreme Court held that the

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[3] U.S. Const., Art. III, § 1.

[4] *See Gliddon Co. v. Zdanok*, 370 U.S. 530, 555 (1961).

Court of Claims was an Article I court.[5] Congress expressed disagreement with this result and expressly enacted that the Court of Claims "is hereby declared to be a court established under Article III of the Constitution of the United States."[6] As the legislative history of this Act indicates, the Congressional purpose for this enactment was to "protect the independence of the bench of the Court of Claims."[7] In light of this pronouncement, the Supreme Court, when granted the opportunity in *Gliddon Co. v. Zdanok*,[8] reassessed its earlier decision and found that the Court of Claims was, indeed, an Article III court.

The Article III status of the Court has not been changed, and the need for protection and independence has in no way been lessened simply by a passage of years. Nor is there anything in the suggested restructuring of the Court of Claims found in the pending legislation which lessens this need for full judicial independence. One must remember that, although nominally a "new court," the United States Claims Court is truly the continuation of the United States Court of Claims, a trial court established under Article III. The ability of the United States Court of Claims, as a court of initial determination, to render final judgments against the government and to be the "conscience of the nation" is now to be the responsibility of the proposed United States Claims Court. The only difference is that, under the provisions of the pending legislation, those final decisions would be appealed to a new body, the United States Court of Appeals for the Federal Circuit. Under S. 677, the courts whose decisions are appealable to the proposed new Court of Appeals for the Federal Circuit, with the exception of the United States Claims Court, *are* Article III courts. Downgrading the United States Claims Court to Article I status, therefore, simply does not make sense. The public deserves to have cases against its government heard by judges totally independent and without pressure from the government defendant. This has been recognized in the past and one wonders why we are retreating from it at the present time.

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[5] *Williams v. United States*, 389 U.S. 553 (1933).

[6] Act of July 28, 1953, § 1, 67 Stat. 226.

[7] H. Rep. No. 695, 83d Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Ad News 2006, 2011.

[8] 370 U.S. 530.

Practical considerations also dictate that Article III status is by far the most preferable. There is added prestige to an Article III position. This may not seem important at first glance, but one must remember that the proposed Claims Court will be a national court and should be formulated in such a way as to tap the best resources of the nation. The work to be accomplished by the United States Claims Court is similar to the civil litigation found in the United States district courts, except that claims brought to the United States Claims Court will generally be more complex. The Committee on the Judiciary of the House of Representatives recently recognized these practical considerations in an unrelated context concerning certain revisions to federal bankruptcy laws. In its Committee Report on this topic, it stated as follows:

> "As noted above, a principal reason for the establishment of an independent court is to attract highly qualified judges. Life-tenure will contribute toward that goal. An attorney with a successful practice would be less likely to seek appointment to a fifteen year term, when the likelihood of reappointment at the expiration of the term is small. If the attorney's age is such that he would not be ready to retire at the end of the term, then he is unlikely to accept such an appointment. There may be means to remedy the problem, such as senior status. If that were the only problem, policy would not favor life tenure. Other reasons exist.
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> "A life-tenure judgeship is a more prestigious position than a term judgeship. The Department of Justice recently observed that the more prestigious the position, the better the judges that will be attracted. It noted
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> 'We will never pay the incomes to judges that they could earn in other pursuits and we must not create conditions that require us to settle for second best in the federal courts.' "[9]

Also, it should be noted that the United States Claims Court if established under Article I and placed in Title 28 as part of the Judicial Branch, would be governed by the Administrative Office of the U.S. Courts but, as now drafted, would not have any representation on the Judicial Conference. If established under Article III, no problems such as this would exist.

[9] H. Rep. No.595, 95th Cong., 1st Sess., at 22 (footnotes omitted).

The only substantive argument cited in opposition to Article III status is that it would perhaps preclude the future use of the Court for Congressional Reference cases. As Dean Meador might well agree, this is like the tail-wagging-the-dog, because there are so few of these cases referred to the Court. However, this "problem" can easily be solved by several methods, including the appointment of four special Commissioners similar to magistrates in the United States district courts, without Article III powers, to hear such cases and otherwise to assist the Court in pretrial matters or in trials containing difficult factual issues. These Commissioners can be kept well occupied in assisting the judges on other judicial matters which can be referred to them (as is done in the district courts), especially in the more complicated cases, such as Indian accounting, government contract, renegotiation claims, etc.

An argument more troublesome to me is one I have heard recently which does not go to the merits of the proposed Article III status in any way, shape or form. This argument, as I understand it, is that it may not be politically palatable to request Article III status for the Claims Court and, in order to insure passage of some legislation, the Court's status should be Article I for the time being. This argument is based on the incorrect assumption that the creation of the United States Claims Court represents the establishment of a "new court." I also believe it is wrong to think that Congress will not understand the need for Article III status for the United States Claims Court judges. Certainly, it will not if an effort is not made to educate those members of Congress voting on the proposal. Surely, Congress would not want to accomplish an incomplete job when it makes so much sense to continue the court as an Article III court.

I am surprised and somewhat disappointed that in all public remarks to date the United States Court of Claims has not taken a position with regard to the status for the proposed United States Claims Court. Certainly, for most of the practicing attorneys here today, the most important aspect of the bill pertains to the United States Claims Court, for this is where we spend most of our time. While proponents of the current legislation and perhaps even members of the current United States Court of Claims may be more concerned with judicial reform on the appellate level, those

of us who practice every day at the Court are more concerned with judicial reform at the trial level. To ignore important issues relating to the proposed United States Claims Court, in an effort to "sell" the appellate package, is simply wrong. The United States Claims Court should be an Article III court. In President Carter's words, "Why not the best?"

B. The United States Claims Court Should Consist of Twenty Judges

Section 708 of S. 677 provides that the President shall appoint, by and with the consent of the Senate, sixteen judges who shall constitute the United States Claims Court. I would strongly recommend that the United States Claims Court consist of at least twenty judges rather than sixteen. There are several reasons for this necessary increase.

First, pursuant to Public Law 94-465, 90 Stat. 1990, a large number of Indian claims cases have recently been transferred to the Court. These cases, often complex and lengthy, take an inordinate amount of time to litigate and decide. Also, as I understand it, the Contract Disputes Act of 1978 creates additional work for the trial court. Of greatest importance, the United States Claims Court will be hearing all cases to be decided on dispositive motion, unlike current practice. This additional workload, in itself, mandates an additional four judges.

As discussed previously herein, four Commissioners or magistrates also should be assigned to the Claims Court. In addition to deciding Congressional Reference cases, there are a multitude of other matters which these Commissioners or magistrates could handle, especially at the pretrial stages of litigation.

C. If Congress Decides in Favor of Article I Status for Judges of the United States Claims Court, Certain Provisions of the Pending Legislation Should Be Revised

That portion of S. 677 dealing with the initial terms of Trial Judges in the Claims Court is inequitable and should be revised. As currently written, each trial judge's first term will be for fifteen years measured from the date of appointment as a *commissioner*. However, a trial judge who has served for more than fifteen years and is more than sixty years old, or who is more than sixty-five when he completes fifteen years of service, may continue to serve until age seventy.

I agree with the Bar Association's position that this provision should be revised in the following manner:

> "Each person who on the effective date of this Act is serving as a commissioner of the United States Court of Claims shall be a judge of the United States Claims Court for a term of five years from the effective date of this Act. If, during such five-year period, such judges are not reappointed by the President in accordance with subsection (a) of this section, their terms shall expire five years after the effective date of this Act."

If adopted, this revised language would ensure that each of the incumbent trial judges is treated equally if Article I status is finally adopted by Congress. Of course, no problems of equality would exist if the preferred Article III status is used.

D. The Provisions of S. 677 (and H.R. 3806) Concerning Selection of the Chief Judge of the United States Claims Court Would Create Unnecessary Problems and Should Be Changed

As drafted, S. 677 would require that the Chief Judge of the Claims Court be elected at least biannually by his colleagues. This could result in intra-court politics and perhaps harm the continuity of court administration. The Bar Association's Court of Claims Committee has proposed that the incumbent Chief of the Trial Division, Trial Judge, Judge Hogenson, serve as the first Chief Judge until the expiration of one year after the effective date of the Act, or until he attains the age of 70 years, whichever occurs last and that thereafter the Chief Judge be selected pursuant to procedures (28 U.S.C. § 183(a)) for the selection of the Chief Judges of the several district courts.

I agree with the Bar's proposal.

IV. Comments Concerning S. 677 (and H.R. 3806) Relating to the Proposed Court of Appeals for the Federal Circuit

A. Appeals to the Court Should Be Heard by Rotating Panels of at Least Five Judges

Under S. 677, the judges of the Court of Appeals for the Federal Circuit would be authorized to determine the size of the panels in which the court would sit, with the provision that panels could not

consist of less than three judges. This was done, according to Dean Meador in his recent statement before Congress, to "provide greater assurance of sound collective judgment and afford greater dignity to the decisions, thereby contributing to nationwide stability in the law."

I applaud the ideas expressed by Dean Meador and the fact that the Administration's bill permits the new Circuit Court for the Federal Circuit to sit in panels of more than three persons. However, I would strongly urge that the language on this subject be revised to *direct* the new court to sit in panels of at least five for every case.

Furthermore, Section 705(b) of S. 677 states that:

> "judges of the Court of Appeals of the Federal Circuit shall be assigned to divisions [changed by H.R. 3806 to panels] for periods of at least two years. At least one, but no more than half, of the members of a division [panel] of the Court of Appeals for the Federal Circuit shall be reassigned to another division [panel] every two years."

The provision calling for the assignment of judges to panels for a period of two years is not a good idea. As I understand it, the current practice at the Court calls for the Chief Judge of the Court of Claims to name panels on a monthly basis. As an outsider, it would seem that the membership of these panels is selected to ensure a continual rotation among the judges, and rarely do the same judges serve together on a single panel for any protracted period of time. It would seem desirable to continue this method of selection of panels since panels remaining constant for at least two years could create fixed and separate views among the bench. Also, fixed panels would seemingly result in the loss of service to the Court by senior judges. Certainly, the Court would not want to lose the input and service of the senior judges.

V. Conclusion

In summary, I applaud the current efforts of the Carter Administration and Congress to restructure the United States Court of Claims, since this court's present structure clearly needs reformation. However, although the pending legislation is directed down the correct path, in several respects it does not proceed far

enough. For those of us practicing before the Court, the most essential portion of the current legislation concerns revisions to the present Trial Division and birth of the proposed United States Claims Court. For the reasons already stated herein, judges at the new Claims Court should be granted the protections afforded by Article III of the Constitution, and not merely be named for 15-year terms as provided in the pending legislation. Other provisions found in S. 677 and H.R. 3806 also are unworkable or ill-conceived and should be revised.

Attached to this article is a draft bill incorporating many of the suggestions found herein. The attached bill, in my opinion, more clearly meets the stated objectives of those advocating reform of the Court of Claims, ensures adequate independence and quality of those trial judges responsible for rendering a final decision in cases before the new Claims Court, and maintains a reasonable workload for the proposed Court of Appeals for the Federal Circuit. It is hoped that Congress will ultimately find legislation similar to the attached draft preferable to the bills currently pending on Capitol Hill.

JUDGE SMITH: Thank you, Angelo.